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THE S.E.C.'S UNCONSTITUTIONALLY COMPELLED SPEECH

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ABSTRACT

Congress delegated to the Securities & Exchange Commission (S.E.C.) the regulation of the sale and trading of securities as well as the solicitation of proxies. The S.E.C. compels disclosure by involved parties to ensure that investors can make informed decisions regarding their trades and the exercise of voting rights with respect to their securities. Such important governmental interests routinely leave one without basis to challenge the compelled speech imposed by the S.E.C. Because it generally can compel speech by parties involved in securities transactions and the solicitation of proxies, the S.E.C. is insensitive to situations when legitimate First Amendment issues emerge. This article proceeds in three parts. Part I is brief and addresses compelled speech under the S.E.C.'s rule regarding conflict minerals, which the D.C. Circuit invalidated under the First Amendment as an ideological, name-and-shame regulation. Part II addresses the S.E.C.'s rule that compelled speech by proxy advisors. Because no court and no scholarship has addressed the rule's validity under the First Amendment, Part II provides a detailed explanation of proxies and their solicitation, the rule, and how that rule unconstitutionally compelled speech. In sum, the S.E.C.'s rule unconstitutionally compelled a proxy advisor—after delivering speech to its clients that advocated a particular position—to deliver to those same clients the speech by a third party that criticized the proxy advisor's original speech. Part III applies the lessons from Parts I and II to a new rule contemplated by the S.E.C. that would compel companies to disclose information regarding the diversity of their boards of directors and workforce. With growing concerns about equity and inclusion, and with the support of S.E.C. commissioners, large investors, and commentators, a rule that requires disclosure regarding board-and-workforce diversity might operate indirectly to cure underrepresentation by protected classes. Judicial decisions, however, display a shift in the primary beneficiaries of First Amendment protection from the politically weak to the financially able and from the individual to the corporation. Though such diversity disclosures would be well intentioned, Part III suggests that compelled diversity disclosures would be at risk of invalidation under the First Amendment.

INTRODUCTION

Congress has generally mandated disclosure to protect investors and facilitate the sale and trading of securities, as well as the exercise of voting rights attendant to such securities.[2] Congress painted with a broad brush, sometimes empowering the Securities and Exchange Commission (S.E.C.) to supplement its statutory disclosure requirements and other times empowering the S.E.C. to craft anew its own disclosure rules.[3] Congressionally-compelled disclosure, as well as disclosure compelled by S.E.C. rules, generally furthers important governmental interests, such as arming investors with sufficient information to enable self-protecting decisions, thereby

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[2] *See* 15 U.S.C. §§ 77e(a), 78m, 78n(a); *infra* Part II.

[3] *See* 15 U.S.C. §§ 77g(a)(1), 77j(c), 78n(a).

promoting capital formation and trading in secondary markets.[4] Due to the gravity of these interests, compelled disclosure under federal securities laws commonly does not give rise to First Amendment concerns.[5] Because First Amendment concerns do not commonly arise under the disclosure requirements of the federal securities laws, the S.E.C. seemingly fails to appreciate the circumstances in which such concerns legitimately arise.[6]

The article proceeds in three parts. Part I provides a study of how a Democratic-dominated S.E.C. unconstitutionally compelled speech regarding conflict minerals.[7] When proposing that rule, the S.E.C. never mentioned the First Amendment. Further, when formally promulgating the rule, the S.E.C. tersely dismissed First Amendment concerns raised by commentators. The D.C. Circuit determined that the First Amendment prevented certain compelled disclosure under that rule.[8] Thus, Part I only briefly describes the rule and the court's analysis. In sum, the court concluded that the regulation was an ideological, name-and-shame regulation that could not withstand intermediate (or deferential) scrutiny.[9]

Part II provides a study of how a Republican-dominated S.E.C., in the closing days of President Trump's term, unconstitutionally compelled speech by proxy advisors.[10] When proposing that rule, the S.E.C. again never mentioned the First Amendment. Again, when formally promulgating the rule, the S.E.C. tersely dismissed First Amendment concerns raised by commentators. Because no court and no legal scholarship has analyzed whether that rule violated the First Amendment, Part II provides a detailed explanation of proxies and their solicitation, the rule, and how that rule violated the First Amendment. In sum, the S.E.C.'s rule unconstitutionally compelled a proxy advisor—after delivering speech to its clients that advocated a particular position—to deliver to those same clients the speech by a third party that (invariably) criticized the proxy advisor's original speech. President Biden's S.E.C. effectively repealed some of the suspect aspects of the rule, but on general policy grounds.[11] Despite manifest constitutional defects, First Amendment concerns did not feature in the partial repeal of that rule. The point of Part II is to emphasize the short shrift that the S.E.C.—regardless of the party in control—gives to First Amendment concerns. Just as Trump's S.E.C. failed to appreciate those

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[4] *See* 1 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 203–27 (5th ed. 2006) (discussing regulation via disclosure, not merits regulation); *What We Do*, SEC, https://www.sec.gov/about/what-we-do [https://perma.cc/P7QD-R3NP] ("The federal securities laws we oversee are based on a simple and straightforward concept: everyone should . . . have access to certain facts about investments and those who sell them.").

[5] For example, the First Amendment does not prevent the prohibition of securities fraud. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–64 (1980); 15 U.S.C. § 78j (barring fraud in connection with the purchase or sale of any security).

[6] Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1267 (1983) ("No one . . . contends that the SEC is especially sensitive to first amendment values . . . .").

[7] Conflict Minerals, 77 Fed. Reg. 56274 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249b).

[8] Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015).

[9] *Id.* at 524, 530. After subjecting the rule to intermediate scrutiny, the court, in dicta, examined it under a deferential standard and reached the same conclusion. *See id.* at 524–30.

[10] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082 (Sept. 3, 2020) (to be codified at 17 C.F.R. 240).

[11] Proxy Voting Advice, 86 Fed. Reg. 67383 (proposed Nov. 26, 2021).

concerns when proposing and adopting the rule, Biden's S.E.C. never mentioned the First Amendment when proposing and repealing the troubling aspects of that rule.

Part III applies the lessons from Parts I and II to address a new rule under contemplation by the S.E.C. that would compel reporting companies to disclose diversity information about their boards of directors and workforce.[12] Individuals in protected classes have long been underrepresented on corporate boards and in high-level executive positions.[13] A new rule that requires disclosure about board-and-workforce diversity might operate indirectly to cure such underrepresentation. Such a rule would have the support of S.E.C. commissioners, large investors, and commentators, and it would address growing concerns about equity and inclusion.[14] Recent judicial decisions, however, have displayed a shift in the primary beneficiaries of First Amendment protection from the politically weak to the financially able and from the individual to the corporation.[15] The Supreme Court is increasingly willing to employ the First Amendment as a "sword . . . against workaday economic and regulatory policy."[16] Part III concludes that compelled diversity disclosures—along the lines of gender, race/ethnicity, and sexual orientation—would be at risk of invalidation on First Amendment grounds.

I. UNCONSTITUTIONALLY COMPELLED SPEECH REGARDING CONFLICT MINERALS

Following the Great Recession, Congress was prompted to enact new financial regulations, resulting in the over-two-thousand-page Dodd-Frank Act.[17] As suggested by the act's length, legislators—when enacting statutes to respond to widespread market turmoil—commonly include special-interest provisions that are unrelated to that turmoil and that otherwise would be unlikely to overcome legislative hurdles.[18] One such miscellaneous provision of the Dodd-Frank Act addressed conflict minerals.[19] It was "the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo

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[12] Notice of Proposed Rule Making: Corporate Board Diversity RIN: 3255-AL91, OFFICE OF INFO. & REG. AFFAIRS (Spr. 2021), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AL91 [https://perma.cc/YN68-BMYU]; Notice of Proposed Rule Making: Human Capital Management Disclosure RIN: 3255-AM88, OFFICE OF INFO. & REG. AFFAIRS (Spr. 2021), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AM88 [https://perma.cc/4CS7-8PED]; Gary Gensler, Chair, SEC, Prepared Remarks at London City Week (June 23, 2021), https://www.sec.gov/news/speech/gensler-speech-london-city-week-062321 [https://perma.cc/2269-8YPX] (expressing consideration of compelled human-capital disclosure, such as "workforce demographics including diversity").

[13] *See infra* Part III.A.iii.

[14] *See id.*

[15] *See* John C. Coates IV, *Corporation Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 248, 262 (2015).

[16] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

[17] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of U.S.C.).

[18] *See* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1523–25 (2005); Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1784–86 (2011).

[19] 15 U.S.C. § 78m(p).

[(DRC)[20]] . . . help[s] to finance conflict characterized by extreme levels of violence . . . , particularly sexual- and gender-based violence, and contribut[es] to an emergency humanitarian situation."[21] Congress did not bar the usage of conflict minerals by U.S. companies, instead it required the S.E.C. to promulgate rules that compelled disclosure regarding a company's investigation into the source of specified minerals used in its products or production processes and regarding its products that were not free of conflict minerals.[22] Following this congressional command, the S.E.C. promulgated the conflict-minerals rule,[23] but acknowledged that the rule was unlike its typical disclosure rules.[24] According to the S.E.C.'s then-Chairperson, the congressionally-required conflict-minerals disclosure seemed "more directed at exerting societal pressure on companies to change behavior, rather than to disclose financial information that primarily informs investment decisions. . . . Seeking to . . . end horrible human rights atrocities in the [DRC is a] compelling objective . . . . But, . . . [she] . . . questioned, as a policy matter, using the federal securities laws and the . . . powers of mandatory disclosure to accomplish th[at] goal . . . ."[25]

When the S.E.C.'s rule was challenged, the D.C. Circuit assumed that the speech was "commercial speech"[26] and applied the intermediate scrutiny of *Central Hudson*.[27] The court concluded that the rule would not survive that scrutiny, and, in an abundance of caution, then applied *Zauderer*'s deferential review. The court assessed the governmental interests behind the compelled-disclosure rule and then evaluated the effectiveness of the rule in achieving those interests, with the burden on the government to prove that the compelled speech would materially alleviate the harms.[28] The S.E.C. asserted that the interests involved ameliorating a humanitarian international crisis and that the court was not to second-guess matters of foreign

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[20] The statute and rules apply to the DRC and any "adjoining country," but for simplicity, this Article refers only to the DRC. *See id.* § 78m(p)(1)(A).

[21] *Id.* § 78m note (Conflict Minerals).

[22] *Id.* § 78m(p)(1)(A). The statute and rules apply to reporting companies, which include publicly-traded companies and particularly large companies. *See* Conflict Minerals, 75 Fed. Reg. 80948, 80950–51 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. pts. 229, 249) (rejecting argument that disclosure requirements should extend beyond reporting companies).

[23] Conflict Minerals, 77 Fed Reg. 56274, 56275–76 (proposed Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 229, 249); Mary Jo White, Chair, SEC, 14th Annual A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture, Fordham Law School: The Importance of Independence (Oct. 3, 2013), https://www.sec.gov/news/speech/spch100113mjw [https://perma.cc/9TYU-D5R7] ("I recognize that when Congress and the President enact a statute mandating such a rule, neither I nor the Commission has the right to just say 'no.'").

[24] *See* Conflict Minerals, 77 Fed. Reg. at 56350 ("Congress intended for the rule issued pursuant to Section 1502 to decrease the conflict and violence [in the DRC]. . . . [The] objectives of Section 1502 appear to be directed at achieving overall social benefits and are not necessarily intended to generate measurable, direct economic benefits to investors or issuers specifically. Additionally, the social benefits are quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve.").

[25] White, *supra* note 23.

[26] *See* Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 521 n.8 (D.C. Cir. 2015) (explaining the difficulty of determining whether speech constitutes "commercial speech" because a speech-for-profit test would wrongly capture books and newspapers, a solicitation-of-money test would conflict with decisions by the Supreme Court, and a commerce-as-subject-matter test would wrongly capture editorials in the *Wall Street Journal*).

[27] *Id.* at 521–24 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980)) (distinguishing Zauderer v. Off. of Disciplinary Couns. of S. Ct. of Ohio, 471 U.S. 626 (1985)).

[28] *Id.* at 524–25, 527.

affairs.[29] The court concluded that the S.E.C. did not meet its burden because the asserted governmental interests—that compelled disclosure would "decrease the revenue of armed groups in the DRC and . . . end or at least diminish the humanitarian crises there"—were unproven and speculative.[30] Unproven and speculative benefits are inadequate when reviewing compelled speech.[31] The court concluded:

> The label "conflict free" is a metaphor that conveys moral responsibility for the Congo war. [The rule] requires a [company] to tell consumers that its products are ethically tainted . . . [even though a company] may disagree with that assessment of its moral responsibility. And it may convey that "message" through "silence." By compelling an issuer to confess blood on its hands, the [S.E.C's rule] interferes with that exercise of the freedom of speech . . . .[32]

The court invalidated Congress' statute and the S.E.C.'s rule to the extent that regulated entities were required to state that any of their products had not been found to be "DRC conflict free."[33]

In proposing the rule, the S.E.C. never mentioned the First Amendment,[34] and, in adopting the rule, the S.E.C. gave short shrift to arguments that the rule unconstitutionally compelled speech.[35] While the D.C. Circuit upheld the rule against an arbitrary-and-capricious challenge under the Administrative Procedure Act—notwithstanding the weak logic that undergirded the rule—it was the First Amendment challenge, to which the S.E.C. accorded little merit, that felled the rule's compelled speech.[36]

II. UNCONSTITUTIONALLY COMPELLED SPEECH BY PROXY ADVISORS

A. Background on Proxies and Their Solicitation

If you own shares of stock in Facebook, then you are entitled to vote on certain matters—such as the election of directors—at an annual meeting.[37] To vote in person, you would have to travel to northern California to attend that annual

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[29] *Id.* at 525.

[30] *Id.*

[31] *Id.* at 526 (citing Edenfield v. Fane, 507 U.S. 761, 770 (1993)).

[32] *Id.* at 530 (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995)).

[33] *Id.* (quoting 15 U.S.C. § 78m(p)(1)(A)(ii); Conflict Minerals, 77 Fed. Reg. at 56364).

[34] Conflict Minerals, 75 Fed. Reg. 80948 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. pts. 229, 249).

[35] When adopting the rule, the S.E.C. twice mentioned that commentators raised First Amendment concerns regarding compelled speech. Conflict Minerals, 77 Fed. Reg. 65274, 56278–79, 56318 (to be codified at 17 C.F.R. 240, 249b). The S.E.C., however, dismissed those concerns in a short paragraph. *Id.* at 56323 (presuming the constitutionality of the statute that required the S.E.C. to promulgate the rule); *id.* (arguing that the speaker's ability to supplement any stigmatizing compelled speech "lessen[ed] the impact on First Amendment interests").

[36] Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 365–73 (D.C. Cir.), *overruled on other grounds by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (en banc).

[37] *See* DEL. CODE ANN. tit. 8, §§ 211, 212 (West 2022). It may be advisable to act on certain matters quickly, in advance of the next annual meeting, so "special" meetings may also be convened. *See, e.g.*, *id.* § 211(d). A state regulates the internal affairs of the corporations that it creates—such as voting rights—and Facebook was organized under Delaware law. Edgar v. MITE Corp., 457 U.S. 624, 645 (1982).

meeting.[38] Similarly, if you are a shareholder of Exxon, then you could travel to Texas to vote your shares in person.[39] And, finally, if you are a shareholder of Citigroup, then you could travel to New York to vote your shares in person.[40] For many shareholders, however, it is rarely worth the time, effort, or expense to travel to a meeting to vote in person. If, however, too many shareholders are not physically present, then a corporation may be unable to conduct business due to the failure to meet quorum requirements.[41] To address this concern, the law permits shareholders to vote remotely—by proxy—rather than in person.[42]

In contrast to an individual investor, who may hold stock in a relatively small number of corporations, consider an institutional investor, which may hold shares in hundreds or even thousands of corporations. For example, TIAA—a teachers' pension fund—commonly owns shares in several thousand U.S. companies and more than ten thousand non-U.S. companies,[43] and TIAA is not unique.[44] Despite such diversification, an institution—a term that includes, among others, mutual funds, exchange-traded funds, private pension funds, public pension funds, and insurance companies[45]—may own significant stakes in individual companies.[46] In the aggregate, institutions own an estimated seventy-five percent of the market value of U.S. public companies.[47] Institutions routinely vote on many discrete agenda items at each annual or special meeting. For example, at the 2019 annual meeting, Citigroup submitted seven matters to shareholders, but one of those matters—the election of fifteen directors—involved fifteen separate votes, for a total of twenty-one separate votes.[48] At their 2019 annual meetings, the shareholders of each of Facebook and Exxon were entitled to vote on nineteen separate matters.[49] Returning to TIAA, that institution annually votes on "more than 100,000 unique

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[38] Facebook, Inc., Proxy Statement (Schedule 14A) (Apr. 12, 2019) (notifying shareholders that the annual meeting will be convened in Menlo Park, CA).

[39] Exxon Mobil Corp., Proxy Statement (Schedule 14A) (Apr. 11, 2019) (notifying shareholders that the annual meeting will be convened in Dallas, TX).

[40] Citigroup Inc., Proxy Statement (Schedule 14A) (Mar. 6, 2019) (notifying shareholders that the annual meeting will be convened in New York, NY).

[41] *See, e.g.*, DEL. CODE ANN. tit. 8, § 216 (West 2022).

[42] *See* 17 C.F.R. §§ 240.14a-1 to -104 (2021); DEL. CODE ANN. tit. 8, § 212(c) (West 2022); 5 JENNIFER L. BERGER, CAROL A. JONES, & BRITA M. LARSEN, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2049.10 Proxy voting–In general. (Perm ed. 2003).

[43] Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518, 66520 n.17 (proposed Dec. 4, 2019) (to be codified at 17 C.F.R. pt. 240).

[44] *Id.* (referring to the Ohio Public Employees Retirement System, which commonly owns shares in over ten thousand companies).

[45] JAMES D. COX, ROBERT W. HILLMAN, DONALD C. LANGEVOORT, ANN M. LIPTON & WILLIAM K. SJOSTROM, SECURITIES REGULATION: CASES AND MATERIALS 100–01 (9th ed. 2020).

[46] *See, e.g.*, Lucian A. Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 721 (2019) (noting that three of the biggest institutional investors—BlackRock, Vanguard, and State Street Global Advisors—"manage[] 5% or more of the shares in a vast number of public companies; and that they collectively cast an average of about 25% of the votes at S&P 500 companies").

[47] *See* Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. at 66519.

[48] *See* Citigroup. Inc., Proxy Statement (Schedule 14A) (Mar. 6, 2019).

[49] *See* Exxon Mobil Corp., Proxy Statement (Schedule 14A) (Apr. 11, 2019) (setting forth ten agenda items, including one agenda item that involved the election of ten directors); Facebook, Inc., Proxy Statement (Schedule 14A) (Apr. 12, 2019) (setting forth twelve agenda items, including one agenda item that involved the election of eight directors).

agenda items."[50] To fulfill obligations to beneficiaries, an institution must cast an informed vote,[51] but becoming informed on so many separate agenda items can prove problematic.[52] While an institution will receive recommendations on how to vote on each issue from the corporation that is conducting the election and soliciting its proxy,[53] an institution may not wish to blindly follow the recommendations of corporate managers, who are self-interested as to one or more matters subject to a vote.[54]

A need for third-party advice emerged and the market responded to that need.[55] For a fee, a third-party proxy advisor provides recommendations to institutions regarding the matters submitted to shareholders for their vote.[56] Although empirically demonstrating causation is difficult, proxy advisors' recommendations

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[50] Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. at 66520 n.17 (quoting TIAA letter).

[51] *See* Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, 84 Fed. Reg. 47420, 47420–21 (proposed Sept. 10, 2019) (to be codified at 17 C.F.R. pts. 271, 276) (discussing the duty of care and conducting a reasonable investigation when an investment adviser votes on behalf of clients); Interpretative Bulletins Relating to the Employee Retirement Income Security Act of 1974, 59 Fed. Reg. 38860, 38860 (proposed July 29, 1994) (to be codified 29 at C.F.R. pt. 2509) (stating that "the fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares of stock").

[52] *See* Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, J. ECON. PERSPS., Summer 2017, at 89, 90–95 ("[D]emonstrating that the agency problems of institutional investors can be expected to lead them to underinvest in stewardship and side excessively with corporate managers."); Stephen Choi, Jill Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality?*, 59 EMORY L.J. 869, 870 n.3 (2010) (noting that diversification across companies and small stakes in individual companies lessens an institution's incentive to cast an informed vote or to engage in expensive research regarding matters subject to a vote); Robert J. Jackson, Comm'r, SEC, Statement on Proxy-Advisor Guidance (Aug. 21, 2019), https://www.sec.gov/news/public-statement/statement-jackson-082119 [https://perma.cc/4X39-L6W9]. Note that an institution is not necessarily required to vote on every matter submitted to shareholders. Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, 84 Fed. Reg. at 47426.

[53] Each of the proxy statements of Facebook, Exxon, and Citigroup recommended that shareholders vote in favor of the proposals made by the corporation and against the proposals made by shareholders. *See supra* notes 38–40.

[54] For example, directors typically solicit proxies for their re-election. *See* Exxon Mobil Corp., Proxy Statement (Schedule 14A) (Apr. 11, 2019) (setting forth on the proxy card: "Solicited by the Board of Directors," each of whom is up for re-election); *id.* at 1 ("All of our nominees currently serve as ExxonMobil directors."). Moreover, shareholders of publicly-traded corporations are entitled to an advisory vote on the compensation of certain executive officers. 15 U.S.C. § 78n-1. One of those officers—the CEO—commonly sits on the board of directors. *See, e.g.*, Facebook, Inc., Proxy Statement (Schedule 14A), at 2 (Apr. 12, 2019) (identifying Mark Zuckerberg as Chairman of the Board and Chief Executive Officer); Aiyesha Dey, Ellen Engel & Xiaohui Liu, *CEO and Board Chair Roles: To Split or Not to Split?*, 17 J. CORP. FIN. 1595, 1595 (2011).

[55] Importantly, the market was aided by a legal development. In 2004, the S.E.C. staff determined that an investment adviser could fulfill its fiduciary duties to its clients when voting shares by relying upon the recommendations of an independent proxy advisor, if in accord with a pre-determined policy. Egan-Jones Proxy Servs., SEC Staff No-Action Letter, 2004 WL 1291240 (May 27, 2004); Inst. S'holder Servs., Inc., SEC Staff No-Action Letter, 2004 WL 2093360 (Sept. 15, 2004). In 2018, the S.E.C. withdrew those no-action letters in anticipation of a Roundtable on the Proxy Process. Statement Regarding Staff Proxy Advisory Letters, SEC (Sept. 13, 2018), https://www.sec.gov/news/public-statement/statement-regarding-staff-proxy-advisory-letters [https://perma.cc/K7YT-E6H4].

[56] Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518, 66519–20, 66522 (proposed Dec. 4, 2019) (to be codified at 17 C.F.R. pt. 240); Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55126 (proposed Sept. 3, 2020) (to be codified at 17 C.F.R. pt. 240) (identifying the three major proxy advisors: ISS, Glass Lewis, and Egan-Jones). *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-765, CORPORATE SHAREHOLDER MEETINGS (2007) (addressing issues relating to firms that advise institutional investors on proxy voting).

may influence the outcome of a corporate election.[57] In addition to recommendations, a proxy advisor may provide institutions with other services, including assistance with the mechanics of voting proxies.[58] Importantly, however, the institution ultimately holds the authority to vote its shares in corporate elections,[59] even if a proxy advisor "pulls the lever in the voting booth," in the same way that an individual shareholder ultimately casts her votes, even if she designates an official (of the soliciting corporation in which she owns shares) to vote her shares on her behalf.

While state corporate law authorizes—and provides some regulation of—proxies,[60] federal law looms large. In Section 14(a) of the Securities Exchange Act of 1934, Congress regulated the solicitation of proxies of publicly-traded companies; however, instead of codifying a comprehensive regulatory scheme, it simply prohibited the violation of rules that the S.E.C. may promulgate.[61] Congress did not actually define "solicitation,"[62] but it did empower the S.E.C. to define terms.[63] "The purpose of Section 14(a) is to prevent . . . deceptive or inadequate disclosure" to shareholders when their proxies are solicited.[64] To meet that purpose, the S.E.C. promulgated rules that bar materially misleading disclosures in the solicitation of proxies.[65] These rules generally require one who solicits proxies to file with the S.E.C.—and then circulate to shareholders—a disclosure document that, among other things, identifies conflicts of interest.[66] The S.E.C. recognized that not every solicitation merited the full brunt of its regulation, so it exempted certain solicitations from the general filing-and-disclosure requirements (but not the bar on materially misleading disclosures).[67] Historically, proxy advisors have benefitted from either of two exemptions from the filing-and-disclosure requirements (while remaining

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[57] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55083; Choi, Fisch & Kahan, *supra* note 52, at 869–70 ("[P]opular accounts substantially overstate the influence of ISS. . . .[F]indings reveal that the impact of an ISS recommendation is reduced greatly once company- and firm-specific factors important to investors are taken into consideration."); *see also* George W. Dent, Jr., *A Defense of Proxy Advisors*, 2014 MICH. ST. L. REV. 1287, 1293 (2014) ("In 2012, ISS and Glass Lewis recommended voting against about 14% of say-on-pay resolutions, but just 2.7% of say-on-pay votes failed."); Allison Herren Lee, Comm'r, SEC Statement on Shareholder Rights (Nov. 5, 2019), https://www.sec.gov/news/public-statement/statement-lee-2019-11-05-shareholder-rights [https://perma.cc/U2ED-9YJ7] ("[T]he vote recommended by management carries the day some 90 percent of the time. Management's views nearly always prevail." (footnote omitted)).

[58] Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. at 66520 n.17.

[59] *See* Interpretative Bulletins Relating to the Employee Retirement Income Security Act of 1974, 59 Fed. Reg. 38860, 38860 (proposed July 29, 1994) (to be codified at 29 C.F.R. pt. 2509); Dent, Jr. *supra* note 57, at 1296–307 (rejecting arguments that institutions have improperly delegated fiduciary duties to proxy advisors).

[60] *E.g.*, DEL. CODE ANN. tit. 8, § 212(c) (West 2022).

[61] 15 U.S.C. § 78n(a) (specifically empowering the S.E.C. with rule-making authority regarding the solicitation of proxies); *id.* § 78w(a) (generally empowering the S.E.C. with rule-making authority); 17 C.F.R. §§ 240.14a-1 to -104 (2021) (setting forth rules that regulate the solicitation of proxies).

[62] 15 U.S.C. § 78c(a) (setting forth definitions but not for "solicitation").

[63] *Id.* § 78c(b).

[64] J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964).

[65] 17 C.F.R. § 240.14a-9 (2021).

[66] *See id.* §§ 240.14a-3, -6; *id.* § 240.14a-101 (setting forth required disclosure on Schedule 14A, including Item 4 ("Persons Making the Solicitation") and Item 5 ("Interest of Certain Persons in Matters to be Acted Upon")).

[67] *See id.* § 240.14a-2 (exempting certain solicitations from the disclosure-and-filing requirements of 17 C.F.R. § 240.14a-3, -6, but not from the protections of 17 C.F.R. § 240.14a-9).

subject to the bar on materially misleading disclosures).[68] The availability of such an exemption is necessary to the survival of a proxy advisor's business.[69] In 2020, however, the S.E.C.—in a three-to-one vote[70]—promulgated rules that limited the availability of these exemptions to proxy advisors:

> Because proxies have become the predominant means by which shareholders of publicly traded companies exercise their right to vote on corporate matters, and institutional investors hold a significant and increasing number of shares, proxy [advisors] have become uniquely situated in today's market to influence, and in many cases directly execute, these investors' voting decisions.
>
> In recognition of the important and unique role that proxy [advisors] play in the proxy voting process and in the voting decisions of investment advisers and institutional investors who often vote on behalf of retail investors, the Commission . . . proposed amendments to the Federal proxy rules . . . to enhance the transparency, accuracy, and completeness of the information provided to clients of proxy [advisors] in connection with their voting decisions.[71]

B. The S.E.C.'s 2020 Amendments

In 2020, the S.E.C. amended the proxy rules in three significant respects. First, the S.E.C. revised the definition of "solicitation" to specifically capture proxy advisors.[72] Second, to be eligible for either of the exemptions (from the filing-and-disclosure requirements) that historically benefitted proxy advisors, a proxy advisor was required to disclose to its clients any material conflict-of-interest information that could affect the objectivity of its voting recommendations, as well

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[68] *See* Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55084 n.25 (Sept. 3, 2020) (codified at 17 C.F.R. pt. 240); 17 C.F.R. § 240.14a-9; *see also* discussion *infra* Part II.C.ii.2.c.1 (addressing an alternative regulatory scheme that renders the S.E.C.'s recent compelled-speech regulation unnecessary).

[69] *See* discussion *infra* Part II.C.i.2.a.

[70] SEC, *2020 07 22 Open Meeting*, YOUTUBE (Dec. 13, 2021), https://www.youtube.com/watch?v=49xB42j1yuQ [https://perma.cc/JST8-FFUK]. The S.E.C. is governed by five commissioners. 15 U.S.C. § 78d. Commissioners Robert J. Jackson, Jr. and Allison Herren Lee opposed the proposed rule. Jackson, *supra* note 52; Lee, *supra* note 57. Between the time of the S.E.C.'s proposal and its adoption, Jackson resigned as a commissioner of the S.E.C. *SEC Historical Summary of Chairmen and Commissioners*, SEC (Dec. 29, 2020), https://www.sec.gov/about/sechistoricalsummary [https://perma.cc/9Z8T-DVC3]. He was not replaced until after the S.E.C. adopted those rules. So, the commissioners approved the rules by a vote of three to one, with Commissioner Lee in dissident. *Id.*; SEC, *2020 07 22 Open Meeting*, YOUTUBE (Dec. 13, 2021), https://www.youtube.com/watch?v=49xB42j1yuQ [https://perma.cc/JST8-FFUK]. Following the election of President Biden, the composition of the S.E.C. became dominated by Democrats. *See* Matthew Goldstein, Lauren Hirsch & Andrew Ross Sorkin, *Gary Gensler Is Picked to Lead S.E.C.*, N.Y. TIMES (Jan. 17, 2021), https://www.nytimes.com/2021/01/17/business/gary-gensler-sec-rohit-chopra-cfpb.html [https://perma.cc/4ZG7-UJMW] (reporting that Democrat Gary Gensler would succeed Republican Jay Clayton, who resigned as Chairperson of the S.E.C. following the 2020 presidential election). Soon thereafter, the S.E.C. proposed to gut the rule that compelled speech by proxy advisors. *See* Proxy Voting Advice, 86 Fed. Reg. 67383 (proposed Nov. 26, 2021) (to be codified at 17 C.F.R. pt. 240). In 2022, the S.E.C. followed through on its proposal, eliminating the compelled-speech requirement at the heart of Part II of this Article. *See* Proxy Voting Advice, 87 Fed. Reg. 43168, 43174–75 (July 19, 2022) (to be codified at 17 C.F.R. pts. 240, 276).

[71] Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55083 (footnotes omitted).

[72] *Id.* at 55087–96 (codified at 17 C.F.R. § 240.14a-1(*l*)(1)).

as the policies "used to identify"—and the "steps taken to address"—such conflicts.[73] Third, to be eligible for either of the exemptions (from the filing-and-disclosure requirements) that had historically benefitted proxy advisors, a proxy advisor was required to take reasonable steps to ensure that (a) any company—that was the subject of the proxy advisor's advice—received a copy of that advice at or prior to the time that the proxy advisor provided that advice to its clients, and (b) its clients were aware "of any response" to the proxy advisor's advice by the company, by, for example, providing a hyperlink to the subject company's response.[74] Those three amendments are discussed in the trailing subsections.

i. Definition of "Solicitation"

The S.E.C. revised the definition of "solicitation" to specifically apply to proxy advisors,[75] even though its longstanding interpretation of "solicitation" extended to them.[76] The S.E.C.'s longstanding definition of "solicitation" reads as follows:

> The terms "solicit" and "solicitation" include:
> (i) Any request for a proxy whether or not accompanied by or included in a form of proxy:
> (ii) Any request to execute or not to execute, or to revoke, a proxy; or
> (iii) The furnishing of a form of proxy or other *communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.*[77]

The S.E.C. had long suggested that a proxy advisor met the criteria of subsection (iii) by providing a recommendation to an institutional shareholder regarding its vote.[78] For example, a proxy advisor may deliver a voting recommendation to an institutional shareholder with the reasonable expectation that, based upon that advice, an institutional shareholder may cast a vote via proxy, withhold a vote via proxy, or revoke a previously cast vote by proxy.[79] In 2020, to remove any doubt about the applicability of the definition to proxy advisors, the S.E.C. supplemented subsection (iii) to include:

> Any proxy voting advice that makes a recommendation to a security holder as to its vote . . . on a specific matter for which security holder

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[73] *Id.* at 55084 n.25, 55096–101 (codified at 17 C.F.R. § 240.14a-2(b)(9)(i)(A)–(B)).

[74] *Id.* at 55084 n.25, 55101–18 (codified at 17 C.F.R. § 240.14a-2(b)(9)(ii)–(iv)).

[75] *Id.* at 55087–96.

[76] *Id.* at 55088–89; Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice, 84 Fed. Reg. 47416, 47417–18 (Sept. 10, 2019).

[77] 17 C.F.R. § 240.14a-1(*l*) (2019) (emphasis added) (amended 2020).

[78] *See* Concept Release on the U.S. Proxy System, 75 Fed. Reg. 42982, 43009 (July 22, 2010).

[79] *See, e.g.*, Bed Bath & Beyond Inc., Proxy Statement (Schedule 14A) (June 22, 2018) ("ISS has recommended a 'withhold' vote on all three members of the Compensation Committee . . . ."); Activision Blizzard Inc., Proxy Statement (Schedule 14A) (Apr. 30, 2018) (referring to instructions on how a shareholder may revoke a previously cast vote that was initially based upon a proxy advisor's recommendation due to the subject's company's response to that advice).

> 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.[80]

The S.E.C. specifically targeted proxy advisors by capturing anyone 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."[81] In so doing, the S.E.C.'s amendment specifically avoided capturing parties other than proxy advisors that may provide proxy voting recommendations.[82] For example, an investment adviser or a broker-dealer may offer proxy voting advice, but this recommendation would not be captured by the amendment, as any such advice would not be "separately" marketed to clients.[83] The S.E.C. indicated that the amended definition of "solicitation" did not amount to a dramatic shift in the law, because the amendment merely codified the S.E.C.'s prior suggestions and interpretations.[84] The S.E.C. noted that a broad interpretation of "solicitation" was consistent with the purpose of Section 14(a) of the Securities Exchange Act, especially considering the exemptions that it provides from many of its proxy rules.[85] The S.E.C.'s other amendments to its rules in 2020, however, limited the availability of those exemptions to proxy advisors.[86]

ii. Conflicts of Interest

The S.E.C. amended the proxy rules to limit the availability of the exemptions that historically benefitted proxy advisors.[87] To be eligible for such an exemption, a

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[80] Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55154 (codified at 17 C.F.R. § 240.14a-1(*l*)(1)(iii)(A)). Additionally, the S.E.C. codified prior interpretations that excluded from the definition of "[*s*]*olicitation* . . . [t]he furnishing of any proxy voting advice by a person who furnishes such advice only in response to an unprompted request." *Id.* at 55089, 55154 (emphasis included) (codified at 17 C.F.R. § 240.14a-1(*l*)(2)(v)). That new exclusion does not benefit proxy advisors because they market their advice, which is inconsistent with the "unprompted" language of the amendment. *Compare* 17 C.F.R. § 240.14a-1(*l*)(1)(iii)(A) (defining proxy advisors in relationship to the definition of "solicitation"), *with* 17 C.F.R. § 240.14a-1(*l*)(2)(v) (providing the exclusion with the "unprompted" language).

[81] Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55089, 55154 (codified at 17 C.F.R. § 240.14a-1(*l*)(1)(iii)(A)).

[82] *See id.*

[83] *See id.*; *see e.g.*, *Investor Bulletin: Investment Adviser Sponsored Wrap Fee Programs*, SEC (Dec. 7, 2017), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_wrapfeeprograms [https://perma.cc/H34Q-3K6M] ("A wrap fee program generally involves an investment account where you are charged a single, bundled, or 'wrap' fee for investment advice, brokerage services, administrative expenses, and other fees and expenses.").

[84] *See* Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55122.

[85] *Id.* at 55087–89.

[86] Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55089, 55154 (codified at 17 C.F.R. § 240.14a-2(b)(9)(i)–(ii)). In 2021, the S.E.C. proposed to amend its 2020 rule, but it did not propose to amend its supplement to subsection (iii). *See* Proxy Voting Advice, 86 Fed. Reg. 67383 67383–84 n.2 (proposed Nov. 26, 2021) (to be codified at 17 C.F.R. pt. 240); *see also* Proxy Voting Advice, 87 Fed. Reg. 43168, 43170 (July 19, 2022) (to be codified at 17 C.F.R. pts. 240, 276) ("Proxy voting advice generally remains a solicitation subject to the proxy rules . . . .").

[87] Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55082, 55084 n.25, 55096–101 (codified at 17 C.F.R. § 240.14a-2(b)(9)(i)(A)–(B)); *id.* at 55101–18 (codified at 17 C.F.R. § 240.14a-2(b)(9)(ii)–(iv)). The requirements addressed in this subsection and the next subsection of this article applied to the supplemented

proxy advisor must disclose to its clients any material information regarding a conflict of interest that could affect the objectivity of its voting recommendations, as well as the policies "used to identify"—and the "steps taken to address"—such conflicts.[88] The S.E.C. expressed concern that institutions may rely upon the "recommendations of proxy advisors" when those recommendations may be tainted by undisclosed "conflicts of interest."[89] For example, ABC Corporation may retain a proxy advisor for guidance regarding its compensation policies, and then the proxy advisor may offer voting advice to its institutional clients regarding the compensation policies about which it provided guidance to ABC Corporation.[90]

Certain proxy advisors are "investment adviser[s]," who already were subject to conflict-of-interest disclosure requirements similar to the S.E.C.'s new rule.[91] The S.E.C. emphasized, however, that other proxy advisors are not "investment adviser[s]," and thus not necessarily required to disclose such information.[92] Moreover, the S.E.C. favored disclosure that was both consistent across proxy advisors and readily accessible to clients of those proxy advisors.[93]

The S.E.C. rejected arguments that the amendment was unnecessary because such conflicts are addressed in the exemptions that historically benefitted proxy advisors.[94] Nor was the S.E.C. satisfied by the pre-existing practice by proxy advisors of voluntarily disclosing conflicts to their clients.[95] And, shifting from the perspective of the advisor to the advisee, the S.E.C. also rejected as inadequate an institution's self-interest against reliance on tainted advice and the obligations

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definition of "solicitations," as discussed in the prior subsection of this article. *See supra* Part II.B.i. Again, the S.E.C. specifically targeted proxy advisors. *Id.*

[88] Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55096–101 (codified at 17 C.F.R. § 240.14a-2(b)(9)(i)(A)–(B)). In 2021, the S.E.C. proposed to amend its 2020 rule, but it largely retained the requirement described in this subsection. *See* Proxy Voting Advice, 86 Fed. Reg. at 67402; *see also* Proxy Voting Advice, 87 Fed. Reg. at 43170 ("PVABs will still have to satisfy [the] conflicts of interest disclosure requirements . . . .").

[89] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55096.

[90] *See id.*

[91] 15 U.S.C. § 80b-2(a)(11) (defining "investment adviser"); Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518, 66527, 66527 n.88 (proposed Dec. 4, 2019) (to be codified at 17 C.F.R. pt. 240) ("[S]ome proxy voting advice businesses are registered as investment advisers under the Advisers Act, and therefore have obligations to disclose conflicts of interest."). In 2007, there were five major proxy advisory firms in the United States—ISS, Glass Lewis, Egan-Jones, Marco Consulting Group, and Proxy Governance Inc.—of which ISS, Marco Consulting Group and Proxy Governance, Inc. were registered as "investment advisers." U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 56, at 7–8. As of July 2020, the S.E.C. identified only three major proxy advisors—ISS, Glass Lewis, and Egan-Jones. Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55126. ISS remains an "investment adviser" and Egan-Jones is registered as a Nationally Recognized Statistical Ratings Organization (NRSRO), and thus must disclose conflicts relating to the "maintenance or issuance of a credit rating." *Id.* at 55126–27, 55132. Akin to the disclosures required of "investment advisers," the S.E.C. stated that any existing disclosures required of NRSROs served regulatory purposes distinct from those of the newly amended proxy rules, even if overlapping. *Id.* at 55131–32.

[92] Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55134.

[93] *Id.* at 55096.

[94] *Id.* at 55098–99; *see* 17 C.F.R. § 240.14a-2(b)(1) (2021) (excluding certain parties from the exemption with obvious conflicts of interest); *see also id.* § 240.14a-2(b)(3)(ii) (requiring that the "advisor discloses to the recipient of the advice any significant relationship with the registrant or any of its affiliates, or a security holder proponent of the matter on which advice is given, as well as any material interests of the advisor in such matter").

[95] *See* Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55097–99.

imposed on institutions to avoid reliance on tainted advice.[96] The S.E.C. believed that the amended rule "enhanc[ed] the existing conflicts of interest disclosures" and should "result in disclosure[s]" that are "more tailored and comprehensive" than pre-existing disclosure requirements.[97]

iii. Compelled Third-Party Speech

The S.E.C. limited the availability of the exemptions that historically benefitted proxy advisors in a second way. To benefit from either traditional exemption, a proxy advisor was required to take reasonable steps to ensure that (1) any company—that was the subject of the proxy advisor's advice—received a copy of that advice "at or prior to the time" that the proxy advisor provided that advice to its clients, and (2) its clients were "aware of any response" to the proxy advisor's voting advice by the company that was the subject of that advice.[98] By prohibiting a proxy advisor from delivering voting advice to a client, without previously or simultaneously providing that advice to the company that was the subject of that advice, the S.E.C. assured that the subject company would have the opportunity to identify any factual errors, omissions, or methodological weaknesses in the proxy advisor's recommendations prior to the time of the vote.[99] In hopes of improving the total "mix of information available to" proxy advisors' clients regarding any shareholder vote, the S.E.C. also mandated that a proxy advisor's clients be made aware of any written response by the subject company.[100] Such a response could identify and address any factual errors, omissions, or methodological weaknesses in the proxy advisor's voting recommendations.[101] The S.E.C. noted that, even in the absence of error, omission, or weakness, and even if the proxy advisor's voting recommendations perfectly aligned with the subject company's voting recommendations, a proxy advisors' clients could benefit from the subject company's differing emphases.[102] To assure that clients were aware of the subject company's response, the S.E.C. created a "non-exclusive safe harbor" that required that (1) the proxy advisor notify its clients that a subject company intended to file, or had filed, a written response, and (2) the proxy advisor provide a hyperlink to the subject company's written response.[103]

The S.E.C. was not persuaded by arguments that there was no convincing evidence that proxy advisors' recommendations frequently suffered from factual errors.[104] The S.E.C. acknowledged that it identified relatively few filings in which

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[96] *See* Egan-Jones Proxy Servs., SEC Staff No-Action Letter, 2004 WL 1291240 (May 27, 2004) (describing an advisee's self-interest assessment).

[97] Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55098.

[98] *Id.* at 55101–18 (codified at 17 C.F.R. § 240.14a-2(b)(9)(ii)–(iv)). In 2021, the S.E.C. proposed an amendment to its 2020 rule that would eliminate the disclosures identified in the text above. *See* Proxy Voting Advice, 86 Fed. Reg. 67383, 67384–85, 67387, 67402 (proposed Nov. 26, 2021) (to be codified at 17 C.F.R. pt. 240).

[99] Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55102.

[100] *Id.*

[101] *See id.* at 55102–03.

[102] *Id.* at 55102, 55107, 55113.

[103] *Id.* at 55110, 55113–14, 55154 (codified at 17 C.F.R. § 240.14a-2(b)(9)(iv)).

[104] *Id.* at 55103–04, 55107, 55131.

subject companies asserted that proxy advisors made foundational errors in their recommendations,[105] but it responded that "more complete and robust information and discussion" was an important goal, regardless of whether proxy advice was *actually* plagued by factual errors or based on weak methodologies.[106] Some commenters believe that the S.E.C.'s amendments were unnecessary because a proxy advisor's voting recommendations are subject to anti-fraud protections,[107] but the S.E.C. favors additional *ex ante* protections by ensuring that a proxy advisor's clients have more timely access to information.[108] Other commenters believe that the S.E.C.'s amendments were unnecessary because any subject company could communicate directly with its shareholders any concerns regarding a proxy advisor's voting advice.[109] The S.E.C. responded that, unless a subject company was in possession of a proxy advisor's advice (which the 2020 amendments required), then a subject company would be in no position to respond.[110]

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A few words about the scope of Part II. One might argue that the S.E.C.'s 2020 amendments violated the Administrative Procedure Act or the specific requirements of the Securities Exchange Act,[111] but that is not the focus of this part. One might argue that the S.E.C. exceeded its statutory authority in amending the definition of "solicitation,"[112] but that is not the focus of this part. One might argue that the S.E.C.

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[105] The S.E.C. never confirmed that any of the claimed errors were truly erroneous. *Id.* at 55107, 55131. Moreover, given the number of claimed errors referenced by the S.E.C., the supposed error rate afflicting proxy advisors' advice was lower than the proxy advisors' self-professed error rate. Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518, 66545–46 tbl.2 (proposed Dec. 4, 2019) (to be codified at 17 C.F.R. pt. 240); Michael Cappucci, *The Proxy War Against Proxy Advisors*, 16 N.Y.U. J.L. & BUS. 579, 599 (2020) (discussing the S.E.C. data, and identifying error rates of less than 2%). Because the S.E.C. relied upon filings, the number of asserted errors may be low, as a proxy advisor's erroneous recommendation may not have resulted in a filing by the subject company. On the other hand, the error rate may be overstated, *id.* at 599 n.95, because the S.E.C. did not confirm the accuracy of the subject companies' assertions of error. Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55107, 55131.

[106] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55107; *see also id.* at 55112 (discussing an "efficient and timely means of providing the businesses' clients with additional information").

[107] *Id.* at 55106.

[108] *Id.* at 55108.

[109] *Id.* at 55106.

[110] *Id.* at 55108, 55112–13.

[111] *See* Letter from Lucian A. Bebchuk, Harv. L. Sch., to Vanessa A. Countryman, Sec'y, SEC, 1–2 (Feb. 3, 2020) (concluding that the S.E.C.'s economic analysis failed to provide a basis for its 2020 amendments); *see also* 5 U.S.C. § 706(2)(A) (requiring a court to hold unlawful an agency action that is arbitrary or capricious); 15 U.S.C. § 78c(f) (requiring the Commission, when rulemaking, "to consider or determine whether an action is necessary or appropriate in the public interest" and also consider "whether the action will promote efficiency, competition, and capital formation."); Bus. Roundtable v. SEC, 647 F.3d 1144, 1154–56 (D.C. Cir. 2011) (invalidating the S.E.C.'s proxy-access rule as violative of the Administrative Procedures Act and the Securities Exchange Act).

[112] While the Securities Exchange Act specifically empowers the S.E.C. to define terms, the statute limits that power to "technical, trade, accounting, and other terms." 15 U.S.C. § 78c(b). Arguably "solicitation" is not a "technical, trade, [or] accounting . . . term," and under the principle of *noscitur a sociis*, the generic "other terms" should not be interpreted expansively to empower the S.E.C. to define "solicitation." And because the specific trumps the general, the specific power to define should not be ignored in favor of more general rule-making authority under the Securities Exchange Act. *See* 15 U.S.C. §§ 78n, 78w(a). Moreover, regarding the solicitation of proxies, some argue that Congress sought to regulate a corporation (and those acting on behalf of the corporation) that was soliciting proxies for its own election, as

cannot legally compel disclosure of a proxy advisor's conflicts of interest,[113] or that the S.E.C. cannot legally compel, at no charge, disclosure of a proxy advisor's advice to the company that is subject to that advice, but neither is the focus of this part. Instead, Part II argues that the S.E.C.'s 2020 rule unconstitutionally compelled a proxy advisor—after delivering speech to its clients that advocated a particular position—to deliver to those same clients the speech by a third party that (invariably) conflicted with the proxy advisor's original speech.

C. Assessing the Constitutionality of Proxy Advisors' Compelled Speech

Section i sets forth key principles of the Supreme Court's compelled-speech cases, before applying those principles to the S.E.C.'s 2020 proxy rules. Section i concludes that the S.E.C.'s 2020 proxy rules were presumptively unconstitutional. Section ii then examines whether the S.E.C.'s 2020 proxy rules would have survived exacting scrutiny and concludes that they would not.

i. Introduction to Compelled Speech

Subsection 1 provides an overview of the Court's compelled-speech jurisprudence that seems most applicable to the S.E.C.'s rules that compelled speech by proxy advisors. Subsection 2 more methodically explains how the S.E.C.'s rules compelled speech and were content-based.

1. Overview

The First Amendment limits the government's ability not only to restrict speech, but also to compel speech.[114] While in its first few decisions addressing the topic, the Supreme Court protected individuals from compelled speech,[115] the Court later

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well as third parties who sought proxy authority because of an interest in the outcome of the election, such as a dissident shareholder who sought election to the board. *See* Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55089–90. Neither of those situations apply to proxy advisors. Allison Herren Lee, *Paying More for Less: Higher Costs for Shareholders, Less Accountability for Management*, SEC (July 22, 2020), https://www.sec.gov/news/public-statement/lee-open-meeting-2020-07-22 [https://perma.cc/FUT5-9KZK] ("[T]he final rules codify a new interpretation of what it means to solicit a proxy under Exchange Act Section 14(a) that departs from the Commission's historical interpretation of that term.").

[113] *See* Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55097–98 (referencing, among other objections, that the costs of the amendment exceed its benefits).

[114] Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796–97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."); *see also* Wooley v. Maynard, 430 U.S. 705, 714 (1977) (emphasizing that the First Amendment protects "the right to speak freely and the right to refrain from speaking at all").

[115] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (invalidating board resolution that required that students salute the flag and recite the Pledge of Allegiance); *Wooley*, 430 U.S. at 713 (invalidating compelled speech on license plate).

extended this protection to corporations.[116] Moreover, while its initial opinions addressed core political speech, the Court's protections against compelled speech now extend across the continuum, applying even to commercial advertisements.[117] Though the government possesses considerable power over an individual's property, it cannot grant *particular, private* speakers access to that individual's property, especially by compelling that individual to deliver criticisms formulated by those favored speakers.[118] In its 2020 amendments to the proxy rules, the S.E.C. granted particular, private speakers—the companies that are the subject of a proxy advisor's voting recommendations—access to the proxy advisor's property—in the form of indirect access to the proxy advisor's email and to its client list—by compelling the proxy advisor to deliver the criticisms of those favored speakers to the proxy advisor's clients.

Two decisions provide particular insight on the Court's compelled-speech jurisprudence as it relates to the S.E.C.'s rules regulating proxy advisors. In *Pacific Gas*—a four-judge plurality opinion—a state commission compelled a private utility—that delivered a newsletter alongside its customer's monthly bill—to include the speech of a third party in its billing envelopes on a quarterly basis.[119] The commission sought to "offer the public a greater variety of views" and to "assist groups . . . that challenge [the compelled speaker]."[120] "The Commission . . . did not equally constrain both sides of the debate about utility regulation. . . . The Commission . . . identifi[ed] a favored speaker 'based on the identity of the interests that [the speaker] may represent,' and force[d] the speaker's opponent . . . to assist in disseminating the speaker's message [, thereby] burden[ing] the expression of the disfavored speaker."[121] "Such one-sidedness impermissibly burden[ed the compelled speaker]'s own expression."[122]

The Court was also troubled that, by compelling speech with which the speaker disagreed, the government effectively compelled the speaker to engage in additional

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[116] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574 (1995) ("Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers.")

[117] *Compare Barnette*, 319 U.S. at 642 (invalidating government resolution that required recitation of the Pledge of Allegiance), *with* Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985) (affording First Amendment protections and upholding compelled speech regarding commercial advertising as "reasonably related to the State's interest in preventing deception of consumers").

[118] *See* Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 376 (2018). Note that the government has constitutionally compelled access to one's property: (1) for the benefit of governmental speakers, *see* Rumsfeld v. F. for Acad. & Inst. Rts, Inc., 547 U.S. 47, 56–57 (2006), and (2) for the benefit of the speaking public when the property owner opened the property to public access, *see* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980).

[119] Pac. Gas & Elec. Co. v. P.U.C. of Cal., 475 U.S. 1, 5–6 (1986) (plurality opinion). The plurality opinion reflected the views of Chief Justice Burger, and Justices Brennan, Powell, and O'Connor. *Id.* at 4. Justice Marshall filed an opinion concurring in the judgment. *Id.* at 21 (Marshall, J., concurring). Justices Rehnquist, White, and Stevens dissented. *Id.* at 26 (Rehnquist, J., dissenting); *id.* at 35 (Stevens, J., dissenting). Justice Blackmun did not participate in the consideration or decision of the case. *Id.* at 21.

[120] *Id.* at 12–13.

[121] *Id.* at 15 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978)).

[122] *Id.* at 13.

speech—speech necessary to disavow and counter the compelled speech.[123] Such pressure would be "particularly apparent when the [speaker] ha[d already] taken a position opposed to the views being expressed [via] his property."[124] "[F]orced response is antithetical to the free discussion that the First Amendment seeks to foster."[125] Finally, the compelled-speech requirement might lead the speaker to alter her original message to avoid the compelled speech.[126]

Like the governmental regulation in *Pacific Gas*, which was intended to "offer the public a greater variety of views" and to "assist groups . . . that challenge [the compelled speaker]," the S.E.C.'s rationale for its 2020 rules was to provide institutional shareholders with "more transparent, accurate, and complete information on which to make their voting decisions"[127] by requiring a proxy advisor to deliver to its clients a response composed by the target of the proxy advisor's original speech. As will be discussed in Part II.C.i.2.e., the subject companies respond only when a proxy advisor offers voting recommendations that are adverse to the subject company. The S.E.C.'s 2020 rules operated to compel speech by the proxy advisor only when the compelled speech criticized the proxy advisor or its advice. Moreover, like *Pacific Gas*, the S.E.C. "identifie[d] a favored speaker 'based on the . . . the interests that [the speaker] may represent.'"[128] The S.E.C. compelled a proxy advisor to deliver only the speech of the company that is subject of the proxy advisor's original speech; no other speakers benefitted from the S.E.C.'s 2020 rules.

Pacific Gas arose during an era involving paper communications, while the S.E.C.'s 2020 amendments emerged during an era of digital disclosure. In *Pacific Gas*, the commission compelled "dissemination [of the third party's speech] in envelopes that [the compelled speaker] own[ed] and that [bore the compelled speaker's] return address."[129] Similarly, the S.E.C. essentially compelled a proxy advisor to send an email to its clients that includes the response by the subject of the proxy advisor's original speech. Sending an email entails property and rights held by the proxy advisor. Furthermore, an email includes the proxy advisor's return address, which runs the risk that its clients may believe that the compelled communication represents the proxy advisor's opinion. The client's potential misconception may require the proxy advisor to disavow or counter the essence of the compelled communication with additional speech.

Similarly, in *Tornillo*, the Court held unconstitutional a state statute that granted "a political candidate a right to equal space to reply to criticism and attacks on his

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[123] *Id.* at 15–17. This reason, standing alone, appears insufficient to render a regulation unconstitutional. *See* Volokh, *supra* note 118, at 385–88.

[124] *Pac. Gas & Elec. Co.*, 475 U.S. at 16 (quoting *PruneYard*, 447 U.S. at 100 (Powell, J., concurring)).

[125] *Id.*

[126] *Id.*

[127] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55108 (Sept. 3, 2020) (to be codified at 17 C.F.R. pt. 240).

[128] *Pac. Gas & Elec. Co.*, 475 U.S. at 15 (quoting *Bellotti*, 435 U.S. at 784); *cf.* Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. at 66533 (proposing that subject companies *and* certain "other soliciting persons" benefit from the compelled-speech requirement).

[129] *Pac. Gas & Elec. Co.*, 475 U.S. at 18.

record by a newspaper."[130] The legislature was motivated to expose readers to a wide variety of views and to provide readers with a candidate's response to a newspaper's criticisms as newspapers were, at that time, influential regional information monopolies.[131] Notwithstanding the legislature's "desirable goal," "press responsibility . . . is not mandated by the Constitution and . . . cannot be legislated."[132] Emphasizing the First Amendment's "freedom of the press," the Court criticized the statute's "compulsion . . . to print that which [the newspaper] would not otherwise print."[133] The statute unconstitutionally "exact[ed] a penalty on the basis of the content of a newspaper."[134] As in *Pacific Gas*, the *Tornillo* Court noted that "the safe course [for a newspaper would be] to avoid controversy," which ultimately could dampen, not enhance, public debate.[135]

Akin to the legislature in *Tornillo*, the S.E.C. was motivated to provide subject companies with an opportunity to respond to the voting recommendations of proxy advisors because proxy advisors are—as suggested by the S.E.C.—noncompetitive and influential.[136] Per *Tornillo*, however, proper motivation alone does not yield constitutional regulation. Just as the *Tornillo* Court was troubled by compelling a speaker to circulate another's countervailing speech to her customers,[137] the S.E.C. compelled a proxy advisor to distribute a subject company's countervailing speech to its clients. Like *Tornillo*, the S.E.C. "exact[ed] a penalty on the basis of the content" of the proxy advisor's recommendation.[138]

Despite the S.E.C.'s asserted interest, its rule was unlikely to enhance the information available to the proxy advisor's clients. First, nothing prevents a subject corporation from *directly* communicating with its own shareholders about a proxy advisor's voting recommendation, eliminating the need for the compelled speech. Second, proxy advisors make publicly available their voting guidelines,[139] so a

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[130] Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 243, 258 (1974). In *Pacific Gas*, the government unconstitutionally compelled the speaker to distribute a critic's speech simultaneously with its own speech. 475 U.S. at 5–6. That simultaneity, however, was not critical to the plurality's holding in *Pacific Gas*, as made clear in *Tornillo*, which addressed an initial voluntary disclosure and a subsequent compelled disclosure. The absence of a simultaneity requirement is important because the S.E.C.'s 2020 proxy rules ultimately did *not* require that a proxy advisor deliver the subject company's criticisms simultaneously with its own recommendations. *Cf.* Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518, 66533–34 (proposed Dec. 4, 2019) (to be codified at 17 C.F.R. pt. 240) (proposing, but ultimately abandoning as unconstitutional, a prior restraint on the proxy advisor's speech); Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55104 n.270, 55105 n.288, 55117 (addressing constitutional objections to the proposed rule).

[131] *Tornillo*, 418 U.S. at 247–48, 252–54.

[132] *Id.* at 256.

[133] *Id.* at 252, 256

[134] *Id.*

[135] *Id.* at 257; *Pac. Gas & Elec. Co.*, 475 U.S. at 16.

[136] *See* Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55112, 55124 (Sept. 3, 2020) (to be codified at 17 C.F.R. pt. 240) ("[A]ny concerns that commenters had regarding . . . diminished competition . . . should be alleviated."). *But see* Dent, Jr. *supra* note 57, at 1307–10 (disputing claims of monopoly).

[137] *Tornillo*, 418 U.S. at 258 ("A newspaper is more than a passive receptable for [others' speech].").

[138] *See id.* at 256.

[139] *See* Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55083 (discussing proxy advisor's "generally applicable benchmark voting policies"); *see, e.g.*, Inst. S'holder Servs., Inc., *United States: Proxy Voting Guidelines Benchmark Policy Recommendations* (Nov. 2020), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf [https://perma.cc/MXM9-K9TY] (publishing their voting guidelines as proxy advisors, making them publicly available).

subject company, in many instances, could preemptively address a forthcoming adverse voting recommendation by a proxy advisor, which would eliminate the need for the S.E.C.'s compelled disclosure. Relatedly, proxy advisors commonly speak with subject companies prior to the time that proxy advisors provide voting recommendations to their clients.[140] This, too, would enable subject companies to directly communicate with their shareholders regarding an adverse voting recommendation from a proxy advisor rather than indirectly communicating with shareholders via proxy advisors by way of the S.E.C.'s compelled speech.

Worse, the S.E.C.'s rule could have reduced the information available to the clients of proxy advisors. As referenced in each of *Pacific Gas* and *Tornillo*, proxy advisors may take the "safe course . . . to avoid controversy" by recommending that clients vote more in line with the subject companies' own recommendations, thereby averting the compelled speech.[141] Institutional clients, however, retain proxy advisors to obtain a "second opinion" beyond the subject corporation's own voting recommendations. If the proxy advisors' voting recommendations mirror the voting recommendations of the subject companies, then there is only "one" opinion, which would be contrary to the S.E.C.'s stated goal of "enhancing the total mix of information available to the proxy [advisor]'s clients."[142] Moreover, the S.E.C.'s 2020 proxy rules risk reducing "the already-scant competition among proxy advisors."[143] A reduction in the number of proxy advisors would reduce the ideas available in the marketplace, which would be contrary to the S.E.C.'s stated goal of "enhancing the total mix of information available to proxy [advisors'] clients."[144] As the Court previously stated, "when the government polices the content of professional speech, it can fail to 'preserve an uninhibited marketplace of ideas' . . . ."[145] This section provided an overview of how the S.E.C.'s compelled disclosure requirements may run afoul of the First Amendment. The next section provides greater detail on how the S.E.C.'s 2020 rules compel speech and are content-based.

2. Elements

In its 2020 amendments to its proxy rules, the S.E.C. regulated the speech of proxy advisors, and the First Amendment applies to the S.E.C.[146]

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[140] *See* Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55103, 55103 n.258 (noting proxy advisors commonly give subject companies a brief window during which to comment on draft voting recommendations before finalization and distribution).

[141] *Tornillo*, 418 U.S. at 257 ("Faced with . . . penalties . . . editors might well conclude that the safe course is to avoid controversy."); *see* Jackson, *supra* note 52 ("[U]nder today's proposal, the SEC is interfering in decades-long relationships between investors and their advisors in a way that will significantly skew voting recommendations toward executives.").

[142] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55136.

[143] Jackson, *supra* note 52.

[144] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55136.

[145] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2366 (2018) (quoting McCullen v. Coakley, 573 U.S. 464, 476 (2014)).

[146] *See* Lowe v. SEC, 472 U.S. 181, 211 (1985) (applying the First Amendment and denying injunction that sought to halt further distribution of publication).

a. Compulsion

The S.E.C.'s 2020 rules *compel* speech by a proxy advisor.[147] One might argue that the S.E.C.'s 2020 rules did not actually *compel* speech because those rules simply denied the availability of an exemption from the general filing-and-disclosure requirements of the S.E.C.'s proxy rules *unless* the proxy advisor complied with the S.E.C.'s speech requirements. Further, one might argue that the S.E.C. did not *compel* speech because it simply created a *nonexclusive* safe harbor that compelled speech. Those arguments are mistaken.

In adopting the 2020 amendments, the S.E.C. effectively alerted proxy advisors: "Comply with the compelled-speech requirements or go out business." If a proxy advisor provided proxy voting advice but did not comply with the 2020 compelled-speech requirements, then it would not have benefitted from either of the historically-utilized exemptions from the S.E.C.'s filing-and-disclosure requirements.[148] If a proxy advisor did not benefit from such an exemption, then it would have been required to publicly file its voting advice.[149] If a proxy advisor publicly filed its voting advice, then any of the proxy advisor's would-be clients could access that voting advice for free.[150] If would-be clients could access that advice for free, then none of them would be willing to pay for that advice, destroying the proxy advisor's business.[151] Given how the S.E.C.'s proxy rules operate, the impact of the S.E.C.'s 2020 rules is obvious and non-speculative: A proxy advisor must have engaged in the compelled speech or risked the future of its business. Thus, the SEC *compelled* speech.[152]

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[147] Lee, *supra* note 112 ("[T]he final rules . . . force proxy advisors to convey management views . . . .").

[148] 17 C.F.R. § 240.14a-2(b)(9)(iii)–(iv) (2021); Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55114 (The S.E.C. "recogniz[ed] . . . a potentially significant adverse result to a proxy voting advice business if it were to lose the ability to rely on the exemptions . . . and be required to comply with the . . . information and filing requirements.").

[149] Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518, 66535 n.146 (Dec. 4, 2019) (to be codified 17 C.F.R. pt. 240) ("Without an applicable exemption on which to rely, the proxy voting advice business likely would be subject to the proxy filing requirements found in Regulation 14A and its proxy voting advice required to be publicly filed.").

[150] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55085 ("For example, such a requirement would effectively allow investment advisers, institutional investors, and other investors who do not subscribe to the services of proxy voting advice businesses to obtain certain proxy voting advice services free of charge.").

[151] *See id.* at 55114 (acknowledging "a potentially significant adverse result").

[152] Although one need not engage in the business of proxy advice, one is still protected from compelled speech. *See* Wooley v. Maynard, 430 U.S. 705, 715 (1977) (concluding that state-mandated speech on a license plate is compelled, even if one doesn't have to own a car). The S.E.C.'s rules might also be analyzed as imposing an unconstitutional condition. The rules conditioned the availability of a statutory exemption—an exemption which was essential to the survival of a proxy advisor's business—on the surrender of a proxy advisor's right not to speak. This coercive effect invites consideration of the constitutionality of such a condition. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–37 (concluding that a public employee cannot be compelled to relinquish First Amendment rights as a condition of public employment); *see also* Wooley, 430 U.S. at 715 (concluding that speech is compelled, when operation of a car is conditioned on the compelled speech because driving a car is a "part of [one's] daily life"). *See generally* Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 594 (1926) ("If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all."); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–7 (1988) ("[E]ven if a state has absolute discretion to grant

One might also argue that the S.E.C. did not *compel* speech simply because a *nonexclusive* safe harbor *compelled* speech, but one would be mistaken. In isolation, the nonexclusive safe harbor obviously did *compel* speech, as it involved a proxy advisor (1) notifying its clients that a company—that was the subject of the proxy advisor's recommendations—intended to file or already filed a response to the proxy advisor's recommendations, and (2) providing a hyperlink to that response.[153] That safe harbor ensured compliance with the S.E.C.'s more general requirement—the proxy advisor must craft "procedures reasonably designed to ensure" that its clients can "reasonably be expected to become aware of any written statements" by the subject company regarding the proxy advisor's recommendations prior to the vote.[154]

The S.E.C. repeatedly stated that the safe harbor was nonexclusive and that proxy advisors could craft alternative processes to meet the requirements of the 2020 rules,[155] but the possibility of compliance via an alternative procedure was illusory. The S.E.C. never detailed how one might otherwise meet the requirement.[156] The S.E.C. did identify a few criteria by which it would evaluate whether a proxy advisor met the requirements of the 2020 rules. Understandably, the criteria were general, focusing on promptness and efficiency.[157] But such generalities would not have emboldened proxy advisors to craft their own policies *ex ante*, only to informed *ex post* that their policies were inadequate, resulting in public enforcement actions and private litigation. Consequently, when dissenting from the rules' adoption, Commissioner Allison Herren Lee criticized her colleagues' claim of "flexibility [because it] is abrogated by the safe harbors which, as is well understood, will become the de facto rules."[158] She did "not object to the use of safe harbors, only to characterizing them as mere suggestions."[159] Turning away from the safe harbor, and focusing on the general requirement, it is unclear how one could "reasonably . . . expect [that another was] aware of [a] written statement[],"[160] except

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or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) ("[The] government may not do indirectly what it may not do directly.").

[153] 17 C.F.R. § 240.14a-2(b)(9)(iv) (2021).

[154] *Id.* at § 240.14a-2(b)(9)(ii).

[155] *See* Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55114 (emphasizing that proxy advisors "retain a significant amount of discretion to formulate their own policies and procedures"); *id.* ("We acknowledge that there are different ways that a proxy voting advice business could structure such a policy consistent with the rule . . . ."); *id.* at 55114 n.381 (noting that the "principles-based requirement gives . . . the option of formulating alternatives").

[156] The S.E.C. did indicate that certain proxy advisors voluntarily deliver to clients the responses by companies that are the subject of the proxy advisor's voting recommendations but, if that was required, then the S.E.C. would simply have altered the form of the compelled speech, not the compulsion. *See id.* at 55117 n.413.

[157] *See id.* at 55115 ("The degree to which a registrant has time to respond and whether the policy ensures prompt conveyance of information to the registrant. The extent to which the mechanism provided to clients is an efficient means by which they can reasonably be expected to become aware of the registrant's written response, once it is filed, such that the client has sufficient time to consider such response in connection with a vote.").

[158] Lee, *supra* note 112.

[159] *Id.* at n.10 ("I do not object to the use of safe harbors, only to characterizing them as mere suggestions. They can be very useful in many circumstances to bring clarity and assurance to compliance. But it is inconsistent with historical market practices to consider them nothing more than one of many potential methods for compliance.").

[160] 17 C.F.R. § 240.14a-2(b)(9)(iv) (2021).

by delivering that statement or by specifically confirming that one was aware of that statement. Why would one bother trying to confirm—which necessarily requires a response to one's question—when one could simply deliver the statement and be done with the matter? Compliance with the safe harbor *was* the means of compliance with the rule.

b. Speech

The S.E.C. compelled a proxy advisor to make disclosures to its clients, which constituted *speech*. While the S.E.C. did not require that a proxy advisor endorse that compelled speech, the mere fact that the S.E.C. compelled a proxy advisor to disseminate that speech implicates First Amendment protections. As stated in the prior section, it is unclear how one could "reasonably . . . expect [that another was] aware of [a] written statement[]," except by engaging in speech.[161]

To benefit from the S.E.C.'s safe harbor, and thus be exempted from the filing-and-disclosure requirement of the S.E.C.'s 2020 proxy rules, a proxy advisor would be compelled to make to up to three disclosures to its clients regarding each company that is the subject of its advice: (1) notice of a subject company's intent to file a written response to the proxy advisor's voting recommendations, (2) notice of any such written response, and (3) a hyperlink to such written response.[162]

Notices—Both of these two notices involve speech.[163] How—except through some form of speech—was the proxy advisor to ensure that a client was "aware of any written statements regarding its proxy voting advice by registrants who are the subject of such advice"?[164]

Hyperlinks—Generally—The S.E.C. considered, but ultimately rejected, a rule that would have required a proxy advisor to deliver to its clients a subject company's actual written response,[165] which obviously would have constituted speech. Rather than requiring delivery of the subject company's actual written response, the S.E.C.'s safe harbor compelled a proxy advisor to deliver a hyperlink to the subject company's written response.[166] One might argue that a hyperlink does not constitute

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[161] *Id.*; *see* Lee, *supra* note 112 ("[T]he final rules . . . force proxy advisors to convey management views . . . .").

[162] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55114 n.381. Although termed a non-exclusive safe harbor, the safe harbor amounts to a de facto requirement. Lee, *supra* note 112 (noting the SEC's claim of "flexibility, however, is abrogated by the safe harbors which, as is well understood, will become the de facto rules"); *id.* at n.10 ("I do not object to the use of safe harbors, only to characterizing them as mere suggestions.").

[163] *See* 17 C.F.R. § 240.14a-2(b)(9)(iv)(B) (2021) ("The proxy voting advice business providing notice to its clients through email . . . .").

[164] *Id.* § 240.14a-2(b)(9)(ii)(B).

[165] Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518, 66551 (proposed Dec. 7, 2019) (to be codified 17 C.F.R. pt. 240). The S.E.C. ultimately rejected such a requirement, in part, because a subject company "would lose the flexibility to present [its] views in the manner [it] deem[ed] most appropriate or effective." *Id.*; Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55143 (rejecting the proposed requirement because "requiring inclusion . . . could disrupt the ability of such businesses to effectively design and prepare their reports . . . [and] registrants would lose the flexibility to present their views in the manner they deem most appropriate or effective").

[166] *See* 17 C.F.R. § 240.14a-2(b)(9)(iv) (2021).

speech.[167] First Amendment protection, however, extends beyond mere words.[168] The Court scrutinizes limits on political contributions under the First Amendment because money may serve as an intermediary device that facilitates the delivery of an idea from one to another.[169] Like money, a hyperlink serves as an intermediary device that facilitates the delivery of an idea from one to another. Like money, a hyperlink "enables speech."[170] The compelled disclosure of a hyperlink may not ask much of a proxy advisor, which burden may impact a court's scrutiny of such compelled speech,[171] but the disclosure is compelled, nonetheless. Absent the S.E.C.'s 2020 regulation, some proxy advisors would not have communicated to their clients that a subject company had crafted a written response.[172]

Hyperlinks—Access Equals Delivery—The S.E.C. has repeatedly articulated the position that the delivery of a hyperlink to speech amounts to delivery of the speech itself: "Access equals delivery."[173] The 2020 amendments also repeatedly reflect that the principle of "access equals delivery." For example, the S.E.C. required that a proxy advisor disclose certain conflict-of-interest information to its clients but stated that a proxy advisor could meet that requirement by providing a hyperlink to the information, rather than directly delivering the information.[174] Similarly, the S.E.C. required that a proxy advisor disclose its voting advice to the subject company but, rather than requiring direct delivery of the advice, the S.E.C. permitted a proxy advisor to simply provide a hyperlink to that advice.[175] The S.E.C. has embraced the access-equals-delivery principle in enforcement actions and other rules.[176]

The access-equals-delivery principle is undergirded by the so-called "envelope theory."[177] Pre-internet, an offeror commonly mailed an envelope to an investor. The envelope may have included one paper document that referenced other paper

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[167] As discussed in the preceding subsection, the S.E.C. does not compel delivery of a hyperlink; the delivery of a hyperlink fits within a specified safe harbor created by 17 C.F.R. § 240.14a-2(b)(9)(iv) (2021). In practice, however, a proxy advisor must comply with the safe harbor. *See* Lee, *supra* note 112.

[168] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 404–06 (1989) (holding First Amendment speech includes the burning of the flag); McConnell v. Fed. Elec. Comm'n, 540 U.S. 93, 177 (2003) (noting that speech includes words as well as expressive activity—burning the flag, dancing, or even contributing money).

[169] *See McConnell*, 540 U.S. at 252 (Scalia, J., concurring).

[170] *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

[171] *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2396–98 (2021) (Sotomayor, J., dissenting) ("[T]he requisite level of scrutiny should be commensurate to the burden a government action actually imposes on First Amendment rights.").

[172] *See* Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55117 n.413 (Sept. 3, 2020) (to be codified at 17 C.F.R. pt. 240) ("For example, we understand that *some* proxy voting advice businesses already provide access to the registrant's proxy filings, including any supplemental proxy materials, automatically through their electronic platform. This kind of approach would generally be consistent with the principle.") (emphasis added).

[173] *See* Securities Offering Reform, 70 Fed. Reg. 44722, 44783 (Aug. 3, 2005) (to be codified at 17 C.F.R. pts. 200, 228, 229, 230, 239, 240, 243, 249 & 274).

[174] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55101 (requiring that a proxy advisor's "client[s are] able to readily access the information . . . for example . . . [by] an active hyperlink").

[175] *Id.* at 55110 n.346.

[176] *See* Securities Offering Reform, 70 Fed. Reg. at 44783 ("Access Equals Delivery"); *In re* Rocky Mountain Ayre, Inc., Exchange Act Release No. 81639 (Sept. 15, 2017) ("The Commission temporarily suspended trading in the securities of RMTN because of questions regarding the accuracy of assertions by RMTN in a press release . . . and in the 'Project White Paper' documents, accessible through a link in the press release . . . .").

[177] Use of Electronic Media, 65 Fed. Reg. 25843, 25846–47 (May 4, 2000).

documents, and, for the investor's convenience, the offeror would include those other paper documents in the same envelope. When considering, for example, an investor's claim of fraud, the S.E.C. would consider all of the documents accessible to the investor in the envelope.[178] With the advent of the internet, the S.E.C. acknowledged that the delivery of paper documents via postal service generally would be slower and more expensive than delivery via the internet.[179] Transitioning from a paper-disclosure regime to a digital-disclosure regime, the S.E.C. has repeatedly applied the envelope theory, concluding that a hyperlinked document was accessible by, and thus delivered to, an investor, even though only a hyperlink—not the document itself—was delivered.[180]

Returning to the 2020 amendments, the S.E.C. implicitly acknowledged both the access-equals-delivery principle and the envelope theory. Under the envelope theory, a proxy advisor (that was compelled to deliver a hyperlink to the subject company's speech) may have been considered to have delivered the speech itself. Having indirectly delivered the content of the linked speech, one might view a proxy advisor as bearing some responsibility for the content of the linked speech. Consequently, the S.E.C. felt the need to clarify that a proxy advisor would not be culpable for the content of the compelled-and-linked speech.[181]

The S.E.C. compelled a proxy advisor to engage in speech, in particular speech that contradicted its previously-articulated viewpoint, which is troubling under the Court's cases.[182] But the S.E.C.'s 2020 regulation was troubling under the Court's precedent in another respect. While the S.E.C. did not compel a proxy advisor to endorse the speech that it compelled, the S.E.C. did require that a proxy advisor utilize its property to disseminate or host a favored third party's speech, as discussed in the next subsection.

c. Compelled Access to Property for Purposes of Speech

The Supreme Court's "compelled-speech cases are not limited to the situation in which an individual must personally speak [another]'s message. [The Court has] also . . . limited the government's ability to force one speaker to host or accommodate another speaker's message."[183] *Tornillo* and *Pacific Gas* exemplify the point. In *Tornillo*, the Court invalidated a "state statute [that] grant[ed] a political candidate a

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[178] *See id.* at 25847.

[179] *Id.* at 25844.

[180] *Id.* at 28545 (concluding that "an embedded hyperlink . . . causes the hyperlinked information to be a part of that document"); Use of Electronic Media for Delivery Purposes, 60 Fed. Reg. 53458, 53463 (Oct. 13, 1995) (stating, at Example (15), "[t]he hyperlink function enables the [document] to be viewed directly as if it were packaged in the same envelope as the [other] literature").

[181] Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518, 66537 (proposed Dec. 4, 2019) (to be codified at 17 C.F.R. pt. 240); Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55114 (Sept. 3, 2020) (to be codified at 17 C.F.R. pt. 240) (stating "[t]he inclusion of a hyperlink required under Rule 14(a)-2(b)(9)(iv) would not, by itself, make the proxy [advisor] liable for the content of the hyperlinked . . . statement").

[182] *See supra* Part II.C.i.

[183] Rumsfeld v. F. for Acad. & Inst. Rts, Inc., 547 U.S. 47, 63 (2006); *see also* Pac. Gas & Elec. Co. v. P.U.C. of Cal., 475 U.S. 1, 16–17 (1985) (plurality opinion) (striking down the government's "content-based grant of access to private property").

right to equal space to reply to criticism . . . [of] his record by a newspaper."[184] That is, the state statute granted a favored speaker access to the compelled speaker's property. *Tornillo* was based upon the First Amendment's guarantee of freedom of the press, but the Court in *Pacific Gas* extended *Tornillo*'s rationale beyond the "institutional press."[185] *Tornillo* also required that a newspaper alter its "coherent speech product,"[186] which seemingly distinguishes its facts from those of proxy advisors because the S.E.C.'s 2020 regulation would not have required any proxy advisor to alter its publication of voting recommendations to its clients. *Pacific Gas,* however, did not require alteration of the compelled speaker's "coherent speech product."[187] Importantly, the regulation in each of *Tornillo* and *Pacific Gas* compelled a speaker to circulate to customers that "which . . . 'reason' t[old her] should not be published."[188] In *Pacific Gas*, the Court invalided a government regulation that required "a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagree[d]."[189] Like *Tornillo* and *Pacific Gas*, the S.E.C.'s 2020 rules compelled a proxy advisor to use its property to disseminate a third party's views with which it disagreed and when reason counseled against publication of those views.[190]

A requirement to facilitate the speech of a private party is not innately constitutionally deficient. In *PruneYard* and *FAIR*, the Court upheld regulations that compelled a private party to host the speech of another party, but those cases are readily distinguished.[191] In *PruneYard*, students circulated pamphlets and sought support for political petitions at a shopping mall.[192] The owner of the shopping mall strictly enforced a policy that barred any visitor or tenant from publicly engaging in expressive activity unrelated to the mall's commercial purposes.[193] The students challenged the mall's exclusionary policy based upon an interpretation of the state's constitution that protects speech and petitioning in privately-owned shopping centers.[194] The Court upheld the students' access to the mall, notwithstanding the mall owner's rights under the First and Fifth Amendments.[195] Though private

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[184] Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 243, 257–58 (1974); *see also* Wooley v. Maynard, 430 U.S. 705, 715 (1977) (invalidating a statute requiring the State motto be displayed on private cars because citizens were compelled to "use their private property as a 'mobile billboard' for the State's ideological message . . . .").

[185] *Pac. Gas & Elec. Co.*, 475 U.S. at 11.

[186] Volokh, *supra* note 118, at 358 (using the phrase "coherent speech product" to refer to "a particular aggregation of speech," like the newspaper in *Tornillo* or the parade of *Hurley*).

[187] *Pac. Gas & Elec. Co.*, 475 U.S. at 11 n.7.

[188] *See Tornillo*, 418 U.S. at 254 (quoting Assoc. Press v. United States, 326 U.S. 1, 20 n.18 (1945)); *see Pac. Gas & Elec. Co.*, 475 U.S. at 11 n.7 ("Like the Miami Herald, however, appellant is still required to carry speech with which it disagreed . . . .").

[189] *Pac. Gas & Elec. Co*, 475 U.S. at 4, 16–17 (striking down the government's "content-based grant of access to private property").

[190] *See* Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55114 (Sept. 3, 2020) (to be codified at 17 C.F.R. pt. 240) ("[A] proxy [advisor] likely would not . . . endorse or approve the content of the [subject company's responsive] statement.").

[191] *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Rumsfeld v. F. for Acad. & Inst. Rts, Inc., 547 U.S. 47 (2006).

[192] *PruneYard Shopping Ctr.*, 447 U.S. at 77.

[193] *Id.*

[194] *Id.* at 77–78.

[195] *Id.* at 76–79.

property, the mall opened itself to the public, and the mall remained free to adopt time, place, and manner regulations to minimize interference with its commercial activities.[196] Moreover, neither the mall nor the mall owner were compelled to engage in any speech.[197] The state constitution did not compel the mall to host any particular speaker or any particular viewpoint.[198] Once the mall opened itself to the public, the state generally could compel the mall to host the speech of its visitors.

In *PruneYard*, the owner of the mall opened the mall to the public; proxy advisors have not invited the public to use their property.[199] In *PruneYard*, the mall owner was not compelled to engage in any speech; the S.E.C.'s 2020 regulation compelled proxy advisors to engage in speech. In *PruneYard*, the government did not compel the mall owner to host any particular speaker; the S.E.C. 2020 rules compelled a proxy advisor to host a particular speaker.[200] In *PruneYard*, the government did not compel the mall to host a particular viewpoint; the S.E.C.'s 2020 regulation—in practice, even if not technically—compelled a proxy advisor to host a particular viewpoint.[201] Though generally supportive of governmental compulsion to host the speech of another party, *PruneYard* ultimately does not support the S.E.C.'s 2020 compelled-speech regulation. Nor does *FAIR*.

After law schools restricted the access of military recruiters to students, Congress enacted a provision that denied an entire university federal funding if any part of the university denied the military access equal to other recruiters.[202] In *FAIR*, law schools challenged the congressional enactment as an infringement of their freedom of speech, and the Court upheld the validity of the act.[203] The Court emphasized that Congress "neither limit[ed] what law schools may say nor require[d] them to say anything."[204] The Court concluded that the act, as a general matter, regulated conduct, not speech.[205] Though the act compelled law schools to host a particular speaker-recruiter (the government), the act compelled such access to law school property only on a par with other speaker-recruiters that the law school voluntarily hosted. And, while the act compelled certain speech of a particular speaker (the government), the act compelled such speech only to the extent that the law school engaged in such speech on behalf of other speakers, which compelled speech was

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[196] *Id.* at 83, 87.

[197] *Id.* at 87–88.

[198] *Id.*

[199] *Cf.* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2076–77 (2021) (noting that, unlike *PruneYard*, the property owner had not opened its property to the public); Pac. Gas & Elec. Co. v. P.U.C. of Cal., 475 U.S. 1, 12 (1985) ("The Commission's order . . . does not simply award access to the public at large . . . .").

[200] *See* 17 C.F.R. § 240.14a-2(b)(9)(ii), (iv) (2021) (requiring a proxy advisor to host the speech of the company that is the subject of its advice and only any such company).

[201] *See supra* Part II.C.i.2.e.; *see also Pac. Gas & Elec. Co.*, 475 U.S. at 12–13 (1985) (plurality opinion) (citation omitted) (The Commission's order . . . discriminates on the basis of the viewpoints of the selected speakers. . . . The variety of views that the Commission seeks to foster cannot be obtained by including speakers whose speech agrees with appellant's . . . . Access is limited to persons or groups—such as TURN—who disagree with appellant's views . . . .").

[202] Rumsfeld v. F. for Acad. & Inst. Rts. Inc., 547 U.S. 47, 51 (2006).

[203] *Id.* at 51, 70.

[204] *Id.* at 60.

[205] *Id.*

factual in nature: "The U.S. Army recruiter will meet interested students in Room 123 at 11 a.m."[206]

FAIR involved the regulation of conduct; the S.E.C.'s 2020 amendments regulate speech.[207] *FAIR* compelled one to host a favored speaker but only to the extent that one voluntarily hosted other speakers; proxy advisors do not host other speakers, but the S.E.C. compelled them to host a particular speaker. Finally, while *FAIR* compelled the disclosure of facts, the S.E.C. compelled a proxy advisor to disclose the opinion of a favored party. Though it upheld governmental compulsion to host the speech of another party, *FAIR* ultimately does not support the S.E.C.'s 2020 compelled speech regulation.

d. Content-Based Regulation

While content-neutral regulations may benefit from lesser scrutiny, content-based regulations invite greater scrutiny by reviewing courts.[208] The S.E.C.'s 2020 compelled-speech requirement is triggered by the content of a proxy advisor's initial speech. If a proxy advisor offered voting recommendations to its clients, then the S.E.C. compelled additional speech by that proxy advisor. If the proxy advisor made no voting recommendations to its clients, then the S.E.C.'s 2020 regulation did not compel additional speech. In each of *McIntyre* and *Pacific Gas*, the Court emphasized that the government's content-based regulation was subject to heightened scrutiny.[209] Perhaps most pertinent to the S.E.C.'s compelled speech, the *McIntyre* Court, when striking down the regulation, emphasized that "only those publications containing speech designed to influence the votes in an election need bear the required markings."[210] Given that the content of the proxy advisor's speech triggered the compelled speech,[211] the regulation may reflect viewpoint discrimination, as addressed in the next subsection.

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[206] *Id.* at 62. The Court also concluded that "the conduct regulated" by Congress was "not inherently expressive." *Id.* at 66. Finally, the Court held that the act did not violate a law school's right of association because military "[r]ecruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association." *Id.* at 69.

[207] *See* NAACP v. Button, 371 U.S. 415, 439 (1963) (noting the government "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights").

[208] *See* McCullen v. Coakley, 573 U.S. 464, 478 (2014).

[209] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345–46 (1995) (subjecting the compelled-speech requirement to "exacting scrutiny, even [if the requirement] . . . applies evenhandedly to advocates of differing viewpoints, [because] it is a direct regulation of the content of speech." (footnotes omitted)); Pac. Gas & Elec. Co. v. P.U.C. of Cal., 475 U.S. 1, 16–17 (1986) (plurality opinion) ("Where, as in this case, the danger is one that arises from a content-based grant of access to private property, it is a danger that the government may not impose absent a compelling interest.").

[210] *McIntyre*, 514 U.S. at 345.

[211] The speech compelled by the S.E.C. was also content-based: Proxy advisors were compelled to disseminate the subject company's substantive response. This too was troubling. *See Pac. Gas & Elec. Co.*, 475 U.S. at 13 (plurality opinion) ("Access to the newspaper in [Tornillo] was content based in two senses: (i) it was triggered by a particular category of newspaper speech, and (ii) it was awarded only to those who disagreed with the newspaper's views.").

e. Viewpoint-Based Regulation

The government may not discriminate against, or in favor of, another's speech based upon its viewpoint.[212] In practice, the S.E.C.'s 2020 compelled-disclosure requirements turned on the viewpoint of the proxy advisor, even if, technically, they did not do so.[213] When proposing the rules, the S.E.C. did not discuss viewpoint discrimination, but after receiving comments that its proposal entailed viewpoint discrimination, the S.E.C. responded.[214] If a proxy advisor offered voting recommendations to a client, then the S.E.C., regardless of the proxy advisor's viewpoint, compelled disclosure of the speech by a subject company in response to the proxy advisor's recommendations. Disclosure was compelled whether the proxy advisor recommended that its clients vote consistent with, or contrary to, the subject company's own recommendations.[215] The S.E.C. also emphasized that it sought to improve the mix of information available to clients of proxy advisors.[216] According to the S.E.C., even if the proxy advisor recommended that its clients vote in conformity with the recommendations by the subject company, the subject company might identify errors by the proxy advisor or methodological weaknesses in its analysis, or even highlight points that the proxy advisor neglected.[217] Technically, the S.E.C. compelled disclosure by proxy advisors regardless of the viewpoint articulated by the proxy advisor.[218]

Nonetheless, the S.E.C.'s rules operated to compel disclosure only when a proxy advisor recommended that its clients *not* vote in accord with the recommendations of the subject company.[219] In its proposal, the S.E.C. repeatedly referred to a process by which a subject company could "respond" to the proxy advisor's voting

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[212] *See* Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019); Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233 (2000).

[213] Robert J. Jackson, Jr., Comm'r, SEC, Statement on Proposals to Restrict Shareholder Voting, at n.3 (Nov. 5, 2019), https://www.sec.gov/news/public-statement/statement-jackson-2019-11-05-open-meeting [https://perma.cc/R6FT-EN9X] ("To be sure, the proposal technically imposes the same requirements regardless of the content of the advice. . . . But the real costs of today's [proposed] regime lie in considering the issuer's feedback [to] . . . the proxy advisor's . . . anti-management advice . . . .").

[214] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55118 (Sept. 3, 2020) (to be codified at 17 C.F.R. pt. 240).

[215] *Id.* (requiring disclosure whether "supportive or adverse").

[216] *See* Lee, *supra* note 112 ("[T]he adopting release backs away from citing factual errors as a specific basis for the rulemaking, . . . [i]nstead, the release is now replete with references to the need to provide shareholders with 'a more complete mix of information.'").

[217] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55113.

[218] *Id.* at 55118.

[219] *See* Jackson, *supra* note 213, at n.3 ("I make the unremarkable assumption that corporate managers reviewing a friendly proxy-advisor recommendation will not impose [the compelled-disclosure] costs on the advisor issuing that opinion."); Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55114 ("[A] proxy [advisor] likely would . . . not endorse or approve the content of the [subject company's responsive] statement.").

recommendations.[220] In context, the S.E.C. meant "*respond* to criticism."[221] Although the S.E.C. asserted that subject companies may respond to favorable voting recommendations by a proxy advisor, the S.E.C.'s compilation of filings by subject companies contradict its assertion.

Whether a subject company extolled or lambasted a proxy advisor for its voting recommendations, the subject company would be engaged in the "solicitation" of proxies, which would trigger the general filing-and-disclosure requirements of the S.E.C.'s proxy rules.[222] From 2016 through 2018, the S.E.C. identified approximately three hundred proxy filings—about one hundred filings each year—by companies responding to the voting recommendations of a proxy advisor.[223] First, it is worth noting that the number of responsive filings is quite small, given the number of companies that filed proxy materials in 2018 (5,690), which, assuming the validity of the claimed errors, suggests an annual error rate of less than two percent.[224] Second, in its proposal, the S.E.C. created five categories, with each filing falling into one or more of those categories; in describing four of the five categories, the S.E.C. specifically stated that the subject company was responding to a "negative recommendation" by the proxy advisor.[225] "General or policy disputes" was the only category that the S.E.C. described without specifically referencing a proxy advisor's "negative recommendation,"[226] but the category's title acknowledged a "dispute" between the subject company and a proxy advisor, which "dispute" may have concerned the proxy advisor's ultimate "negative recommendation." Importantly, many of the filings that would fall into that category did involve a proxy advisor's "negative recommendation."[227] Contrary to its seemingly baseless assertion that subject companies would respond to "favorable recommendations" by proxy

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[220] *See* Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518, 66530 n.107 (proposed Dec. 3, 2019) (to be codified at 17 C.F.R. pt. 240) (quoting FRANK PLACENTI, ARE PROXY ADVISORS REALLY A PROBLEM?, AMERICAN COUNCIL FOR CAPITAL FORMATION 3 (Oct. 2018) (referencing opportunity to "respond to . . . factual" inaccuracies)); *id.* at 66533 (referencing opportunity to "respond to negative proxy voting recommendations").

[221] *See Respond*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/respond [https://perma.cc/WGM9-V4DG]; *infra* notes 229–232 and accompanying text.

[222] 17 C.F.R. § 240.14a-1(l) (2021); *id.* §§ 240.14a-3, -6; Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. at 66533.

[223] Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. at 66544–46 tbl.2; Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55130.

[224] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55130.

[225] Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. at 66545 n.239 ("We divide registrant concerns into five categories: (1) factual errors, (2) analytical errors, (3) general or policy disputes, (4) amended or modified proposal, and (5) other."); *id.* at 66546 tbl.2.

[226] *Id.* at 66545 n.239 ("We classify a concern as 'general or policy disputes' when the registrant does not dispute the facts or the analytical methodology employed but instead generally espouses the view that specific evaluation policies or the evaluation framework established by the proxy voting advice business are overly simplistic or restrictive and do not adequately or holistically capture the merits of the proposal.").

[227] *See, e.g.*, Genuine Parts Co., Proxy Statement (Schedule 14A) (Mar. 15, 2016) (referring to ISS's negative recommendation to a director nominee due to its policy on "overboarding," which refers to one's service to other companies that could jeopardize one fulfilling her obligations to the subject company, and stating the subject company's objection to the application of that policy to that director); Kirby Corp., Proxy Statement (Schedule 14A) (Mar. 18, 2016) (referring to ISS's and Glass Lewis's negative recommendations regarding the election of a director who was not independent under their standards, but who met the independence standards of the NYSE and the subject company).

advisors, the S.E.C. did not bother creating a category for responsive filings to "favorable recommendations."[228] The S.E.C. publicly disclosed the roughly three hundred responsive filings that it compiled,[229] but it did not identify, for example, which specific filings included a "factual error" or an "analytical error" that led to a "negative recommendation" by a proxy advisor.[230] In reviewing the filings compiled by the S.E.C., I identified responsive filings that, consistent with the S.E.C.'s assertion, referenced favorable recommendations by a proxy advisor. A subject company, however, referenced a favorable voting recommendation by a proxy advisor only when responding to either (1) an *unfavorable* voting recommendation by a *different* proxy advisor,[231] or (2) a dissident shareholder that opposed a voting recommendation by the subject company.[232]

So, if a proxy advisor recommended that its clients vote contrary to the recommendations of the subject company, then the subject company may respond. If the subject company responded, then the proxy advisor would be compelled to share the subject company's views—which views would be contrary to the proxy advisor's own views—with the proxy advisor's clients.[233] Alternatively, if a proxy advisor recommended that its clients vote consistent with the recommendations of the subject company, then, based upon a review of the S.E.C.'s compiled historic filings, the subject company would not respond, and the proxy advisor would not be compelled to engage in any speech. In practice, the S.E.C. compelled proxy advisors to speak based upon their viewpoints, and the compelled speech would contradict

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[228] *See* Jackson, *supra* note 213, at n.3 ("I make the unremarkable assumption that corporate managers reviewing a friendly proxy-advisor recommendation will not impose [the compelled-disclosure] costs on the advisor issuing that opinion.").

[229] *See* Memorandum from Division of Econ. & Risk Analysis, SEC, on Data Analysis of Additional Definitive Proxy Materials Filed by Registrants in Response to Proxy Voting Advice (Jan. 16, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6660914-203861.pdf [https://perma.cc/E9SS-U4NC].

[230] The number of errors may be understated, because a subject company may not have filed a response. *See* Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. at 66546. The number of errors may be overstated, as the S.E.C. relied upon claims stated by the subject companies, without attempting to confirm the accuracy of those claims. Of course, the subject companies may make errors in their responsive filings. *Compare* Kirby Corp., Proxy Statement (Schedule 14A) (Mar. 17, 2016) (stating, incorrectly, the recommendation of Glass Lewis: "ISS Proxy Advisory Services . . . recommended voting against Mr. Waterman's reelection as a director. . . . Glass Lewis, another leading proxy advisory firm, has recommended voting FOR Mr. Waterman . . . ."), *with* Kirby Corp., Proxy Statement (Schedule 14A) (Mar. 18, 2016) (correcting the previous filing: "Institutional Shareholder Services (ISS) and Glass Lewis & Co. (Glass Lewis) . . . recommended voting against Mr. Waterman's reelection as a director."). On the other hand, with respect to those responsive filings, those companies were subject to the S.E.C.'s proxy rules that bar materially misleading disclosures. *See* 17 C.F.R. § 240.14a-9 (2021).

[231] *See, e.g.*, CNX Resources Corp., Proxy Statement (Schedule 14A) (Apr. 30, 2018) ("On the one hand, proxy advisory firm Glass, Lewis & Co. issued a report recommending a vote FOR the Say-on-Pay Proposal, noting in particular CNX's alignment of pay with performance. On the other hand, . . . proxy advisory firm ISS issued its report recommending a vote against the Say-on-Pay Proposal."); DiamondRock Hospitality Co., Proxy Statement (Schedule 14A) (Apr. 18, 2018) ("Glass Lewis has recommended a FOR vote for Proposal 2 [Say-on-Pay]. However, ISS recommended an AGAINST vote on Proposal 2.").

[232] *See, e.g.*, Macquarie Infrastructure Corp., Proxy Statement (Schedule 14A) (May 3, 2018) (responding to a proxy contest launched by a dissident shareholder over the election of directors by noting that "leading proxy advisory firm Glass Lewis has also recommended . . . that stockholders vote for all six of MIC's director nominees").

[233] *See* Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55114 (Sept. 7, 2020) (to be codified at 17 C.F.R. pt. 240) ("[A] proxy [advisor] likely would . . . not endorse or approve the content of the [subject company's responsive] statement.").

those viewpoints.[234] Moreover, because parties other than proxy advisors are exempt from the compelled speech, it appears that S.E.C. specifically targeted proxy advisors when their speech countered that of a subject company.[235] Notwithstanding the fact that the S.E.C.'s 2020 rules may be technically viewpoint-neutral, "viewpoint discrimination [may be] inherent in the design and structure" of the government's regulation,[236] triggering heightened scrutiny. "The government must abstain from regulating speech when the . . . opinion . . . of the speaker is the rationale for the [regulation]."[237] The S.E.C. seemingly designed its 2020 rules to apply when a proxy advisor opposed the recommendations of a subject company—not only according to proxy advisors directly impacted by the new rules, but also according to two of the S.E.C.'s five commissioners,[238] institutional shareholders (which are supposedly the direct and primary beneficiaries of the S.E.C.'s compelled speech),[239] and commentators.[240] Nonetheless, even if one accepts the claims of the S.E.C. that its 2020 rules were viewpoint neutral, glaring defects remain. The question of neutrality, however, will be revisited in later sections of this Article.

ii. Exacting Scrutiny

The Supreme Court has not always clearly articulated the level of scrutiny applied in compelled-speech cases[241] and has yet to establish a definitive level of scrutiny for all such cases. In the recent *Americans for Prosperity* opinion, a

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[234] *See id.*; *see also* Pac. Gas & Elec. Co. v. P.U.C. of Cal., 475 U.S. 1, 10 (1986) (plurality opinion) ("[T]he newspaper's expression of a particular viewpoint triggered an obligation to permit other speakers, with whom the newspaper disagreed, to use the newspaper's facilities to spread their own message.").

[235] *See generally Pac. Gas & Elec. Co.*, 475 U.S. at 12–13 ("The order does not simply award access to the public at large; rather, it discriminates on the basis of the viewpoints of the selected speakers. . . . The variety of views that the Commission seeks to foster cannot be obtained by including speakers whose speech agrees with appellant's. . . . Access is limited to persons or groups . . . who disagree with appellant's views . . . .").

[236] Nat'l Inst. of Fam. & Life Advocates v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring; joined by Roberts, C.J., Alito & Gorsuch, JJ.) ("It does appear that viewpoint discrimination is inherent in the design and structure of this Act. . . . [a]nd the history of the Act's passage and its underinclusive application suggest a real possibility that these individuals were targeted because of their beliefs."); *id.* at 2380 (Breyer, J., dissenting; joined by Ginsburg, Sotomayor & Kagan, JJ.).

[237] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[238] *See* Jackson, *supra* note 213, at n.3 ("To be sure, the proposal technically imposes the same requirements regardless of the content of the advice. . . . But the real costs of today's [proposed] regime lie in considering the issuer's feedback [to] . . . the proxy advisor's . . . anti-management advice . . . ."); *id.* ("[U]nder today's proposal, the SEC is interfering in decades-long relationships between investors and their advisors in a way that will significantly skew voting recommendations toward executives."); Lee, *supra* note 112 ("[T]he final rules . . . force proxy advisors to convey management views . . . ."); Lee, *supra* note 57 ("The . . . proposal related to proxy advisors potentially impairs, and may even preclude, shareholders' ability to vote in reliance on independent voting recommendations." (footnote omitted)).

[239] *See, e.g.*, Letter from Kenneth A. Bertsch, Exec. Dir., & Jeffrey P. Mahoney, Gen. Counsel, Council of Inst. Inv'rs, to Vanessa A. Countryman, Sec'y, SEC, at 3 (Feb. 20, 2020) (criticizing the proposal which "forc[es] proxy advisors to . . . include a hyperlink to a company's unverified assertions in opposition to proxy research and analysis").

[240] *See, e.g.*, Cappucci, *supra* note 105, at 579 ("[C]orporate interests have sought to make it more difficult for institutional investors to vote proxies independently of management by urging measures that would hamstring their proxy service providers.").

[241] *See, e.g.*, Janus v. AFSCME Council 31, 138 S. Ct. 2448, 2464–65 (2018) (finding it unnecessary to specify the applicable standard of review in a compelled-speech case); Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 164 (2002) (same).

three-justice plurality applied "exacting scrutiny" in a compelled-speech case arising under the First Amendment's right of free association.[242] At least two justices in that case believe that the Court has not yet determined whether to apply "exacting scrutiny" across the board in all compelled-speech cases that arise under the First Amendment.[243] Justice Thomas asserted that "exacting scrutiny" provides *inadequate* protection against compelled-speech, and he would apply "strict scrutiny."[244] In the most applicable content-based, compelled-speech cases, however, the Court's prevailing standard of review appears to be "exacting scrutiny,"[245] which requires that the government craft narrowly-tailored—but *not* the least restrictive—means of serving a compelling governmental interest.[246] In an as-applied challenge, the government cannot simply assert "hypothetical" or "speculative" interests that flow from the compelled speech.[247] Subsection 1 examines the S.E.C.'s asserted interests and concludes that they were speculative, at best. Section 2 then examines whether the S.E.C.'s compelled speech requirements were narrowly-tailored to achieve those asserted interests and concludes that they were not.

1. Governmental Interests

In *J.I. Case Co. v. Borak*, the Supreme Court explained that the purpose of Section 14(a) of the Securities Exchange Act is to "prevent . . . deceptive or inadequate disclosure in proxy solicitation[s]."[248] Similarly, the S.E.C. specified that the purpose of its proxy rules, which were promulgated under Section 14(a), is to "prevent the dissemination . . . of untruths, half-truths, and otherwise misleading information" in the solicitation of proxies.[249] Both the Court and the S.E.C.

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[242] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2382–83 (2021) (plurality opinion).

[243] *See id.* at 2391–92 (Alito, J., concurring; joined by Gorsuch, J.). Three dissenting justices also criticized the three-justice plurality for "holding that narrow tailoring applies to disclosure requirements across the board, even if there is no evidence that they burden anyone at all." *Id.* at 2394 (Sotomayor, J., dissenting; joined by Breyer & Kagan, JJ.).

[244] *See id.* at 2389–91; Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 255 (2010) (Thomas, J., concurring); Johanns v. Livestock Mktg. Ass'n., 544 U.S. 550, 567 (2005) (Thomas, J., concurring); Buckley v. Am. Const. L. Found., 525 U.S. 182, 206 (1999) (Thomas, J., concurring).

[245] Pac. Gas & Elec. Co. v. P.U.C. of Cal., 475 U.S. 1, 19 (1986) (plurality opinion); *see* Buckley v. Am. Const. L. Found., 525 U.S. 182, 204 (1999); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995); Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 798 (1988). The Court has applied more deferential standards in cases that seem inapplicable to the speech compelled by the S.E.C. in its 2020 amendments to its proxy rules. *See* Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985) (upholding compelled disclosures of "purely factual and uncontroversial information" in advertisements because the regulations were "reasonably related to the State's interest in preventing deception of consumers").

[246] *See McIntyre*, 514 U.S. at 347; *Riley*, 487 U.S. at 798; *Pac. Gas & Elec. Co.*, 475 U.S. at 19 (plurality opinion).

[247] Nat'l Inst. of Fam. & Life Advocates v. Becerra, 138 S. Ct. 2361, 2377 (2018) (striking down compelled-speech regulation when asserted governmental interests were "purely hypothetical"); *Riley*, 487 U.S. at 811–12 (Rehnquist, C.J., dissenting) ("[W]e have nothing but speculation to guide us . . . ."); *see Buckley*, 525 U.S. at 210 (Thomas, J., concurring) ("[T]he State has failed to satisfy its burden of demonstrating that fraud is a real, rather than a conjectural, problem.").

[248] J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964).

[249] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55118 n.424 (Sept. 3, 2020) (to be codified at 17 C.F.R. pt. 240) (quoting Statement by Commission, Exchange Act Release No. 1350 (Aug. 13, 1937)).

emphasized "prevent[ion]," which suggests that prophylactic compelled speech may be perfectly acceptable,[250] such that the government or any party wronged by a misleading proxy disclosure should not be limited to *ex post* litigation.[251]

In promulgating the 2020 amendments to its proxy rules, the S.E.C. explained the breadth and depth of the stock ownership of institutional shareholders and the potential influence of the voting recommendations by proxy advisors when those institutional shareholders vote their many shares.[252] Consequently, the S.E.C. promulgated the 2020 amendments to its proxy rules to ensure that clients of proxy advisors "receive more *transparent*, *accurate*, and *complete* information on which to make their voting decisions."[253] *Transparency* would be furthered if the clients of proxy advisors received the speech directly from the speaker—the subject of the proxy advisor's advice—rather than indirectly from the proxy advisor,[254] which—having already opined contrary to the benefitted speaker—may feel compelled to disassociate itself from the views of the government-favored speaker.[255]

Claims of *inaccuracy* ring hollow. Corporations that are the subject of the voting recommendations of proxy advisors, as well as groups that advocate on behalf of those subject corporations, *claimed* that the advice of proxy advisors all too frequently suffers from "factual errors, incompleteness [, and] methodological weakness."[256] Yet the claimed deficiencies are not widespread, based upon a review of the S.E.C.'s compilation of subject companies' supplemental proxy filings that respond to the voting recommendations of proxy advisors.[257] For each year over a three-year period, the S.E.C. identified about one hundred supplemental proxy filings that responded to adverse voting recommendations by a proxy advisor, but, for those years, there were annual filings for over five thousand subject companies—which, assuming the validity of the claim errors, yields an error rate of less than two percent.[258] The S.E.C., however, did not verify any of the claimed incidents of error, incompleteness, or weakness, nor did the S.E.C. make a determination regarding the materiality of the claimed deficiencies.[259] The S.E.C. did not mention any

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[250] *See* United States v. O'Hagan 521 U.S. 642, 666–77 (1997) (upholding S.E.C. rule requiring prophylactic disclosure due to the "prevent" language enacted by Congress).

[251] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55107 ("[I]t is appropriate to adopt reasonable measures designed to promote the reliability and completeness of information available to investors . . . at the time [the clients of proxy advisors] make voting determinations.").

[252] *See supra* Part II.A.

[253] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55082 (emphasis added); *id.* at 55102 ("transparent, accurate, and materially complete information").

[254] Citizens United v. Fed. Elec. Comm'n, 558 U.S. 310, 371 (2010) ("[T]ransparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

[255] *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) ("Appellants are not . . . being compelled to affirm their belief in any governmentally prescribed position or view, and they are free to publicly dissociate themselves from the views of the speakers or handbillers."); Pac. Gas & Elec. Co. v. P.U.C. of Cal., 475 U.S. 1, 11 n.7 (1986) (plurality opinion) ("[A]ppellant is . . . required to carry speech with which it disagreed, and might well feel compelled to reply or limit its own speech in response to [that of the private party that benefitted from the government's compelled-speech regulation].").

[256] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55102.

[257] *See supra* Part II.C.i.2.e.

[258] *See id.*

[259] *See* Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55103–04 (noting a "substantial number of commenters . . . argued that there was an absence of compelling evidence of frequent errors

enforcement actions that it had initiated regarding the advice of any proxy advisor to its clients.[260] Nor did the S.E.C. discuss any private litigation regarding the advice of any proxy advisor to its clients.[261]

While reviewing courts must sometimes tolerate projections by the government regarding the need for regulation, such tolerance seems inapplicable in this setting as proxy advisors have been advising many clients for many years. The dominant proxy advisor—Institutional Shareholder Service (ISS)—was founded in 1985 and, during 2020, it covered approximately 44,000 shareholder meetings in 115 countries and executed over ten million ballots on behalf of its clients.[262] Glass Lewis—which is ISS's primary competitor—was founded in 2003 and, during 2020, it served more than 1,300 clients and covered more than 20,000 shareholder meetings across 100 global markets.[263] Egan-Jones, which was established in 2002, covered approximately 40,000 companies, as of 2016.[264] So, for many years, proxy advisors have covered many shareholder votes at many shareholder meetings at many subject companies across many countries when advising many clients. Given this vast record, the S.E.C. should have been able to identify and verify material deficiencies in voting recommendations by proxy advisors before compelling speech to cure such deficiencies. The S.E.C., however, failed to identify such deficiencies. Ironically, the institutional shareholders—the principal direct beneficiaries of the compelled disclosure—generally expressed satisfaction with the advice provided by their proxy advisors and advocated against the S.E.C.'s 2020 compelled-speech rules.[265] Claims of *inaccuracy* appear speculative.[266]

Perhaps acknowledging that adverse voting recommendations by proxy advisors generally do not result from errors, incompleteness or methodological weakness, the S.E.C. explained that it was "not motivated solely by . . . the factual accuracy of proxy voting advice. . . . [E]ven where proxy voting advice is not adverse to the registrant's recommendation or where there are no errors in the advice,"[267] the clients of proxy advisors, according to the S.E.C., would benefit from the compelled speech that reflects the views of the subject company, which might offer different emphases when reaching the same voting recommendations as proxy advisors.[268] Here, the S.E.C. theorized that the compelled disclosure would result in clients receiving more *complete* information from proxy advisors, even in the presence of favorable voting

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or significant deficiencies in proxy voting advice . . . ." and referencing "belie[f]s"—not confirmed incidents—of "errors, mistakes, and deficiencies in voting advice").

[260] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 56, at 4 ("To date, the SEC has not identified any major violations and has not initiated any enforcement action again proxy advisory firms.").

[261] Lee, *supra* note 112 ("[The SEC] still ha[s] not produced any objective evidence of a problem with proxy advisory firms' voting recommendations. No lawsuits . . . , and no objective evidence of material error—in nature or number. Nothing.").

[262] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55126.

[263] *Id.* at 55127.

[264] *Id.*

[265] *Id.* at 55103-04.

[266] *See* Lee, *supra* note 112 ("[T]he adopting release backs away from citing factual errors as a specific basis for the rulemaking . . . .").

[267] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55107.

[268] *Id.*

recommendations by those proxy advisors or in the absence of underlying error.[269] This claimed benefit of the compelled speech is speculative both in theory and in practice.

In theory, there is no reason for a subject company to respond to favorable voting recommendations by a proxy advisor or to supplement those favorable recommendations with differing emphases. Recall that the subject company was the first party to communicate to shareholders the issues on which those shareholders would vote, the first party to make recommendations on how those shareholders should vote, and the first party to explain why shareholders should vote according to those recommendations.[270] The subject company's explanations for its recommendations are fulsome; those explanations anticipate and address potential objections.[271] Only after the subject company has distributed its proxy statement—which identifies the issues on which the shareholders will vote and sets forth the subject company's voting recommendations and reasons therefor—does the proxy advisor make its recommendations. If the proxy advisor's recommendations are favorable, complete, and methodologically strong, then there's no reason for a subject company to expend the resources to respond. And, if the proxy advisor's recommendations are favorable but incomplete or methodologically weak, then the subject company's response is unnecessary because the subject company already provided complete and methodologically-strong disclosures in its initial recommendations.

As discussed in Part II.C.i.2.e., based upon a review of the S.E.C.'s compilation of subject companies' supplemental proxy filings that respond to the voting recommendations of proxy advisors, a subject company does not respond to a proxy advisor's voting recommendations that are favorable to the subject company. In the S.E.C.-compiled supplemental proxy filings, a subject company referenced a *favorable* voting recommendation by a proxy advisor only when responding to either (1) an *unfavorable* voting recommendation by a *different* proxy advisor,[272] or (2) a dissident shareholder that opposed a voting recommendation by the subject company.[273] And those occasions were rare.[274] So, the S.E.C.-compiled evidence

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[269] *Id.* at 55136 (discussing "enhance[d] total mix of information").

[270] *See, e.g.*, Facebook, Inc., Proxy Statement (Schedule 14A) (Apr. 12, 2019) (setting forth, on proxy card, the recommendations: "The Board of Directors recommends you vote FOR the [re]Election of Directors. . . . The Board of Directors recommends you vote AGAINST [all of the] stockholder proposal[s].").

[271] *See* Lee, *supra* notes 57 ("[T]here is no basis for assuming that greater issuer involvement would improve proxy voting advice. [Though] issuers bring deep expertise and insight, . . . [t]heir views are . . . already easily accessible.").

[272] *See, e.g.*, CNX Resources Corp., Proxy Statement (Schedule 14A) (Apr. 30, 2018) ("On the one hand, proxy advisory firm Glass, Lewis & Co. issued a report recommending a vote FOR the Say-on-Pay Proposal, noting in particular CNX's alignment of pay with performance. On the other hand, . . . proxy advisory firm ISS issued its report recommending a vote against the Say-on-Pay Proposal."); DiamondRock Hospitality Co., Proxy Statement (Schedule 14A) (Apr. 18, 2018) ("Glass Lewis has recommended a FOR vote for Proposal 2 [Say-on-Pay]. However, ISS recommended an AGAINST vote on Proposal 2.").

[273] *See, e.g.*, Macquarie Infrastructure Corp., Proxy Statement (Schedule 14A) (May 3, 2018) (responding to a proxy contest launched by a dissident shareholder over the election of directors by noting that "leading proxy advisory firm Glass Lewis has also recommended . . . that stockholders vote for all six of MIC's director nominees").

[274] The primary area of dispute between a subject company and a proxy advisor was executive compensation, for which the shareholders' vote is non-binding, 15 U.S.C. § 78n-1(a), (c), though not necessarily unimportant. *See*

does not support the S.E.C.'s assertion that subject companies will respond to favorable voting recommendations or to voting recommendations with which they find no fault. This finding should surprise no one.[275]

The S.E.C. also referenced indirect beneficiaries of its compelled-speech rules—the clients of an institutional shareholder that receives voting recommendations from a proxy advisor (for example, one that invests in Fidelity mutual funds) and the shareholders of a corporation (that is, the subject of voting recommendations by a proxy advisor) who are *not* clients of those proxy advisors (for example, Aunt Jane who directly acquired shares of Exxon, but who does not pay ISS for its voting recommendations).[276] Although the S.E.C. did not compel disclosure by proxy advisors to either of those groups of investors, the S.E.C. believed that those investors nonetheless would benefit from its compelled-disclosure rules.[277] According to the S.E.C., the institutional shareholders, which commonly are clients of proxy advisors, would benefit from the S.E.C.'s compelled-disclosure rules, and those institutional shareholders generally have vast shareholdings and may cast the outcome-determinative votes.[278] So, if the outcome-determinative votes are more informed, then all shareholders—including non-clients of proxy advisors—benefit from the compelled speech.[279] First, the S.E.C.'s asserted benefit is speculative, as the S.E.C. acknowledged that non-client shareholders "*may* be affected by the recommendations" of proxy advisors.[280] As discussed previously, the causal link between a proxy advisor's voting recommendations and a client's vote is unclear.[281] For example, did the proxy advisor's recommendation cause the client to vote a particular way or did widely-available facts underlying the proxy advisor's recommendation cause that vote? Moreover, the largest institutional shareholders—that is, those shareholders most likely to cast outcome-determinative votes—conduct their own research when making voting decisions, develop their own voting policies (which are then implemented by a proxy advisor), and retain the services of multiple proxy advisors when deciding how to vote.[282] Finally, and as will be developed in the next section, the compelled speech was unnecessary because the subject company's response would constitute a "solicitation" and would be filed with the S.E.C. and available to the public, including non-clients of proxy advisors.[283]

The S.E.C.'s concern regarding the *completeness* of a proxy advisor's recommendations is weak. The benefits of S.E.C.'s compelled-speech requirements

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STEVEN J. CLEVELAND, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: A MULTIMEDIA APPROACH loc. 6259 (3d ed. 2018).

[275] *See* Jackson, *supra* note 213 ("I make the unremarkable assumption that corporate managers reviewing a friendly proxy-advisor recommendation will not impose [the compelled-disclosure] costs on the advisor issuing that opinion.").

[276] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55107 (Sept. 3, 2020) (to be codified at 17 C.F.R. pt. 240).

[277] *See* 17 C.F.R. § 240.14a-2(b)(9)(ii), (iv) (2021) (requiring disclosures only to a proxy advisor's clients).

[278] *See* Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55107.

[279] *See id.*

[280] *Id.* (emphasis added).

[281] *See supra* note 57 and accompanying text.

[282] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 56, at 5–6.

[283] *See* 17 C.F.R. §§ 240.14a-3, -6 (2021); Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55106.

were, at best, speculative. "Speculative" benefits, however, are insufficient when courts consider an as-applied challenge to governmental regulations that compel speech. Even when crediting the S.E.C.'s speculative interests, its compelled-speech regulation was not narrowly tailored.

2. Narrowly-Tailored

The S.E.C.'s 2020 compelled-speech rule was not narrowly tailored because it was both underinclusive and overinclusive. The rule was underinclusive in that it specifically targeted proxy advisors, but not others that provided inaccurate, incomplete, or methodologically-weak voting recommendations to shareholders. Moreover, the rule was underinclusive in that it benefitted only the companies that were conducting the election, not, for example, private third parties that were competing in that election and that suffered from a proxy advisor's inaccurate, incomplete, or methodologically-weak voting recommendations. The rule was overinclusive in that it compelled proxy advisors to deliver a subject company's speech even if the proxy advisor's initial speech was accurate, complete, and methodologically strong. Moreover, even if a proxy advisor's speech was inaccurate, incomplete, or methodologically weak, the S.E.C.'s rule was unnecessary because the S.E.C.'s interests could have been achieved—without compelling speech—by other means: The S.E.C. could have vigorously enforced its rule that prohibits materially misleading proxy solicitations; the subject company could have engaged in counter speech; and the government could have engaged in its own speech.

a. Underinclusive

The S.E.C.'s compelled-speech regulation was underinclusive in two respects. First, the S.E.C.'s 2020 amendments specifically targeted proxy advisors, but not others that provided inaccurate, incomplete, or methodologically-weak voting recommendations to shareholders. The applicability of the compelled-speech regulation was limited to a person 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 [also] 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.*"[284] That limitation excluded, for example, the typical investment adviser or broker from the compelled-speech regulation,[285] even if those parties provided inaccurate, incomplete, or methodologically-weak voting recommendations to their clients.

Second, the S.E.C.'s compelled speech was also underinclusive in that it specifically benefitted the companies that were the subject of a proxy advisor's voting recommendations but did not benefit other parties that found the advice of proxy advisors to be inaccurate, incomplete or methodologically weak. The S.E.C.'s

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[284] 17 C.F.R. § 240.14a-1(*l*)(1)(iii)(A) (2021) (emphasis added).

[285] *See supra* Part II.B.i.

rule benefitted "[r]egistrants that are the subject of the proxy voting advice. . . ."[286] The S.E.C. proposed—but did not promulgate—a rule that would have compelled speech favoring such registrants "or *any other person conducting a solicitation* (other than a solicitation exempt under § 240.14a-2)."[287] The S.E.C.'s proposal excluded other parties from the benefits of its compelled speech, such as a shareholder making a proposal under Rule 14a-8,[288] notwithstanding the fact that a proxy advisor may have made a voting recommendation regarding that proposal that was inaccurate, incomplete, or methodologically weak.[289] The S.E.C.'s proposed rule would have benefitted any third party that would send its own proxy statement to shareholders, such as a contested election for directors.[290] But, the S.E.C. ultimately excluded those "other person[s] conducting . . . [non-exempt] solicitation[s]" due to the possibility of imposing significant costs on proxy advisors, [291] and because contested elections are "generally fast-moving and can be subject to frequent changes and short time windows,"[292] such that compelling proxy advisors to speak on behalf of those "other person[s] conducting . . . solicitation[s]" could be unduly burdensome.

The S.E.C.'s rationale for excluding third parties—and limiting the beneficiaries of its compelled-speech regulation to the companies that were the subject of a proxy advisor's advice—was unpersuasive. While the S.E.C. generally analyzed the costs of the regulations imposed on proxy advisors due to the regulations ultimately promulgated,[293] the S.E.C. did not similarly analyze the costs that would have been imposed on proxy advisors if non-registrants had also benefitted from its rules that compel speech. And, although the S.E.C. correctly noted that contested elections are fast-moving and where the facts are frequently-changing, such disparities do not justify disparate treatment. Further, the disparity rationale is ultimately inconsistent with the rules ultimately adopted in two respects. First, the S.E.C. justified its compelled-speech regulation that benefitted subject companies because clients of proxy advisors vote immediately after receiving advice from those proxy advisors.[294] That "short time period[]" prompted the S.E.C. to compel a proxy advisor to deliver to its clients the speech of a subject company.[295] Based upon information compiled

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[286] 17 C.F.R. § 240.14a-2(b)(9)(ii)(A) (2021); *id.* § 240.14a-2(b)(9)(ii)(B) (addressing "registrants who are the subject of such advice"); *id.* § 240.14a-2(b)(9)(iv) (addressing "registrant that is the subject of such advice").

[287] Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518, 66558 (proposed Dec. 4, 2019) (to be codified at 17 C.F.R. pt. 240) (proposing Rule 14a-2(b)(9)(iii) (emphasis added)).

[288] 17 C.F.R. § 240.14a-8 (2021).

[289] Lee, *supra* note 57 ("[T]he proposal declines to provide shareholder proponents the same opportunities to review the recommendations that it would require for issuers. While I am skeptical as to the value of the review periods, I cannot see the reason for denying it to shareholders while providing it to issuers.").

[290] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55109 n.338, 55116–17 (Sept. 3, 2020) (to be codified at 17 C.F.R. pt. 240).

[291] *Id.* at 55102.

[292] *Id.* at 55116.

[293] *Id.* at 55136–39 (undertaking "Economic Analysis" of costs of compelled speech); *see id.* at 55123 ("[M]any of the economic effects of the amendments cannot be reliably quantified.").

[294] Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518, 66530 (2019) ("[A] substantial percentage of proxy votes are typically cast within a few days or less of the proxy voting advice business's release of its proxy voting advice . . . .").

[295] *Id.* at 66533.

by the S.E.C., however, the "short time period" does not significantly differ between the situations in which the S.E.C.'s rule compels speech and those situations that the S.E.C. excluded from the compelled-speech requirements.[296] Additionally, notwithstanding the frequently-changing facts of contested elections, the S.E.C. never contemplated compelling a proxy advisor to deliver the subject company's speech on more than one occasion,[297] even if, for example, new facts emerged. So, if the facts continued to evolve in ways that impacted the proxy advisor's voting recommendations, then both the subject company *and* the proxy advisor would have been required to update their communications. A scenario involving changing facts did not justify excluding other parties from the benefits of the S.E.C.'s compelled-disclosure rule.

"Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than favoring a particular speaker or viewpoint."[298] Commentators argued that the S.E.C.'s compelled-speech regulation favored the subject corporations and their viewpoints. Commissioner Allison Herren Lee emphasized that the clients of proxy advisors—which, in theory, were the direct, primary beneficiaries of the compelled-speech—did not request, and actually opposed, the compelled-speech regulation.[299] Moreover, Commissioner Lee noted that the S.E.C.'s regulation favored a particular viewpoint—the viewpoint of the management of the subject company.[300] Professor George Dent shared her concerns. Professor Dent first noted that, after institutions began to use the services of proxy advisors, voting outcomes adverse to the recommendations of the management of the subject companies became much more common.[301] Then he boldly asserted that "[t]his change offend[ed] corporate executives[, who] want[ed] to seize back untrammeled power[, prompting them] and their allies [to] wag[e] a massive campaign to hobble the proxy advisors,"[302] which resulted in the S.E.C.'s 2020 regulations. His assertion gains some traction because the S.E.C. excluded activists

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[296] *Compare* Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55130–31 ("[T]he [S.E.C.'s] staff identified in a subset of additional definitive proxy material filings in 2018, where data were available, the number of business days between when a proxy voting advice business delivered proxy voting advice and when the registrant filed additional definitive proxy materials, and the number of business days until the planned shareholder meeting. Based on this sample, staff estimated a median value of three business days and an average value of 3.8 business days between when a proxy voting advice business issues proxy voting advice and when a registrant responds. Further, the median (average) number of days between the registrant response and the shareholder meeting based on the sample was 9.5 (10.3) business days."), *and id.* at 55105 n.295 (describing one advisor's "business model is to provide its voting advice report to clients and companies simultaneously 15 days prior to the meeting"), *with id.* at 55116 n.398 ("On average, proxy research reports were delivered to clients 14 days before the meeting date [in] M&A transactions and 13 days in contested situations.").

[297] Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. at 66530 (requiring only "one standardized opportunity for timely review and feedback").

[298] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 802 (2011) (regulating purveyors of (violent) video games, but not booksellers, cartoonists, or movie producers); *see* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233 (2000) ("The proper measure . . . is the requirement of viewpoint neutrality in the allocation of funding support.").

[299] Lee, *supra* note 112 ("These rules are not wanted by those they purport to benefit."); *id.* at n.9 ("[I]t stretches credulity to assert to investors that we act in their best interests by making policy choices they fervently oppose.").

[300] *Id.* ("[T]he final rules . . . force proxy advisors to convey management views . . . .").

[301] Dent, Jr. *supra* note 57, at 1289.

[302] *Id.*; *see id.* at 1311 ("Dissatisfaction [with proxy advisors] seems to be limited to the managers of issuers whose monopoly on corporate power has been weakened by the proxy advisors.").

from the benefits of its compelled-speech regulation. The S.E.C.'s compelled-speech regulation was not only underinclusive, it was also overinclusive.

b. Overinclusive

The S.E.C.'s compelled-disclosure rule was overinclusive. First, although the S.E.C. promulgated the rule to address the risk that proxy advisors delivered inaccurate, incomplete, or methodologically-weak advice to their clients, the S.E.C.'s rule compelled a proxy advisor to deliver to its clients the speech of a subject company even if the proxy advisor's advice was accurate, complete, and methodologically strong. Thus, the rule was not narrowly tailored.[303] Moreover, the S.E.C.'s compelled-speech regulation required the proxy advisor to deliver to its clients any "any written statements regarding its . . . advice by registrants who [were] the subject of such advice" and its safe harbor required delivery of "additional soliciting material" of the subject company, regardless of whether the subject company's written statement or soliciting material addressed the accuracy, completeness, or methodologies of the proxy advisor's advice. Further, the proxy advisor was required to deliver the subject company's response even if that response was inaccurate, incomplete or methodologically unsound.[304]

c. Unnecessary

When scrutinizing regulations that compel speech, a court must "understand[] the extent to which the burdens are unnecessary."[305] The S.E.C.'s rule was not narrowly tailored because the S.E.C. could have achieved its goals, without compelling speech, by other means: (1) the S.E.C. could have vigorously enforced its rule that prohibited materially misleading proxy solicitations; (2) the subject company could have engaged in counter speech; and (3) the S.E.C. could have engaged in its own speech.

(1) First, the S.E.C.'s rule that prophylactically compelled speech as a guard against a proxy advisor's voting recommendations that were inaccurate, incomplete, or methodologically weak was unnecessary because the S.E.C. could have vigorously enforced pre-existing proxy rules that bar materially misleading proxy solicitations. Most notably, Rule 14a-9 has long barred one from making materially misleading statements in the solicitation of proxies.[306] Congress authorized the S.E.C. to pursue anyone that violated, is violating, or is about to violate the federal

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[303] McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 349–51 (1995) ("We agree with Ohio's submission that this interest [in preventing fraud] carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large. . . . [However, a]s this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading."); Buckley v. Am. Const. L. Found., 525 U.S. 182, 210 (1999) (Thomas, J., concurring) ("The State's . . . requirement . . . burdens all circulators, whether they are responsible for committing fraud or not.").

[304] 17 C.F.R. § 240.14a-2(b)(9)(ii)(B), (iv) (2021). Recall that, in practice, the S.E.C.'s safe harbors are the de facto means of compliance with the S.E.C.'s rules. *See supra* Part II.C.i.2.a.

[305] Ams. For Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2385 (2021).

[306] *See* 17 C.F.R. § 240.14a-9(a) (2021).

securities laws or the rules promulgated by the S.E.C.,[307] and the S.E.C. historically has pursued parties that materially misled shareholders while soliciting proxies.[308] Moreover, the Supreme Court implied a private cause of action with respect to the bar against materially misleading disclosures in the solicitation of proxies.[309] The S.E.C. promulgated its compelled-speech rule without finding that any proxy advisor materially misled any client and in the absence of any enforcement actions or private litigation regarding the delivery of voting advice by proxy advisors.[310]

According to Supreme Court precedent, compelled-speech regulations are not narrowly tailored when alterative extant regulations render the compelled-speech regulation unnecessary. In *McIntyre*, the Supreme Court wrote:

> We agree with Ohio's submission that this interest [in preventing fraud] carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large. Ohio does not, however, rely solely on [the compelled-speech regulation] to protect that interest. Its Election Code includes detailed and specific prohibitions against making or disseminating false statements during political campaigns. . . . Thus, Ohio's prohibition of anonymous leaflets plainly is not its principal weapon against fraud. Rather, it serves as an aid to enforcement of the specific prohibitions and as a deterrent to the making of false statements by unscrupulous prevaricators. Although these ancillary benefits are assuredly legitimate, we are not persuaded that they justify [the challenged statute]'s extremely broad prohibition. As this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading.[311]

In *Riley*, the Supreme Court similarly concluded, "[M]ore benign and narrowly tailored options [than the regulation that compels speech] are available. For example, . . . the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements."[312] Aside from the enforcement of pre-existing rules, the S.E.C.'s compelled-speech regulation appears unnecessary for other reasons, including counter speech.

(2) Second, the S.E.C.'s 2020 regulation—that compelled a proxy advisor to deliver to its clients the responsive speech of a company that was the subject of the proxy advisor's advice—was unnecessary because the subject company could have

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[307] *See* 15 U.S.C. § 78u.

[308] *See, e.g.*, *In re* Walt Disney Co., Exchange Act Release No. 50882, 84 SEC Docket 1832 (Dec. 20, 2004); Complaint at 3–9, SEC v. Wachovia Corp., No. 04-1911 (D.D.C. Nov. 4, 2004); *In re* Gen. Elec. Co., Exchange Act Release No. 50426, 83 SEC Docket 2407 (Sept. 23, 2004).

[309] *See* J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964).

[310] Lee, *supra* note 112 ("[The SEC] still ha[s] not produced any objective evidence of a problem with proxy advisory firms' voting recommendations. No lawsuits, no enforcement cases, no exam findings, and no objective evidence of material error—in nature or number. Nothing.").

[311] McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 349–51 (1995) (citations and footnotes omitted).

[312] Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 800 (1988).

delivered that response directly to its shareholders.[313] The subject company could have engaged in speech to counter whatever speech a proxy advisor delivered to the shareholders of that subject company.

The S.E.C. may have had a legitimate concern regarding the effectiveness of counter speech prior to its 2020 amendments to the proxy rules. In the 2020 amendments, the S.E.C. compelled two types of disclosures by proxy advisors. First, the S.E.C. compelled a proxy advisor to deliver its voting recommendations to the company that was the subject of those recommendations at or before the time that it delivered those recommendations to its clients.[314] Second, as has been the focus of Part II, the S.E.C. compelled a proxy advisor to deliver to its clients any response by a subject company to the proxy advisor's voting recommendations.[315] In a world without the first type of compelled disclosure, a subject company would not know when, whether, or how to respond to the proxy advisor's voting recommendations. Arguments of counter speech are unavailing if one is unaware of the speech that one is to counter.[316] But if one accepts the validity of the first type of compelled disclosure, as Part II does,[317] then there would be no need for the second type of compelled disclosure.

Accepting the validity of a regulation that compelled a proxy advisor to deliver its advice to a company that is the subject of that advice, the subject company would know when, whether, and how to respond. The S.E.C. acknowledged that a subject company could engage in counter speech: "[R]egistrants are able . . . to file supplemental proxy materials to respond to negative proxy voting recommendations and to alert investors to any disagreements they have identified with a proxy voting advice business's voting advice . . . ."[318] Nonetheless, the S.E.C. remained concerned. Because of "the high incidence of voting that takes place very shortly after a proxy [advisor's] advice is released to clients,"[319] a company that was the subject of a proxy advisor's voting recommendations would lack the time to compose and file a response, according to the S.E.C. Thus, the S.E.C.'s 2020 amendments required a proxy advisor to ensure that its clients were aware of the subject company's response by notifying those clients that a subject company intended to file (or had filed) a written response and delivering that written response to them.[320] Despite the S.E.C.'s concerns regarding timing, neither the delivery of the notice nor delivery of the response was necessary.

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[313] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55106 (Sept. 3, 2020) (to be codified at 17 C.F.R. pt. 240) ("Many commenters asserted the proposal is unnecessary given the ability of registrants to conduct investor outreach and file supplemental proxy materials to address any concerns with the voting advice.").

[314] 17 C.F.R. § 240.14a-2(b)(9)(ii)(A) (2021). Though proxy advisors commonly provide subject companies with an opportunity to review and comment on draft voting recommendations, the practice was not universal across proxy advisors nor universal across subject companies. Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55108. The S.E.C.'s 2020 rules compelled such disclosure.

[315] 17 C.F.R. § 240.14a-2(b)(9)(ii)(B), (iv) (2021).

[316] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55108.

[317] *See supra* notes 111–113 and accompanying text (addressing the scope of the article).

[318] Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518, 66533 (proposed Dec. 4, 2019) (to be codified 17 C.F.R. pt. 240).

[319] *Id.*

[320] 17 C.F.R. § 240.14a-2(b)(9)(ii), (iv) (2021).

Regarding the notice, the subject company—without the aid of the proxy advisor—could have directly alerted its shareholders that it intended to respond to the proxy advisor's advice. In another context, the S.E.C. authorizes a subject company to deliver to its shareholders a "Stop-Look-and-Listen" notice, so its shareholders "defer making a determination . . . until they have been advised of the subject company's position."[321] In the context of soliciting proxies, the subject company could have delivered directly to its shareholders a "Stop-Look-and-Listen" notice that it intended to respond to the voting recommendations of a proxy advisor and that shareholders should defer voting until hearing from the subject company. After the subject company encouraged its shareholders to "Stop-Look-and-Listen," any shareholder that was inclined to do so could wait for the subject company's response to the proxy advisor's voting recommendations.

Similarly, the subject company—without the aid of the proxy advisor—could have delivered directly to shareholders its written response to the proxy advisor's advice. While the S.E.C. suggested that subject companies may lack time to file responsive supplemental proxies, its rule required the proxy advisor to deliver to its clients a response statement, which would constitute a "solicitation" by the subject company that would have to be filed with the S.E.C. So, the S.E.C.'s rationale appeared illogical and unintentionally ironic: A subject company would not have time to file a response with the S.E.C. so the proxy advisor must deliver to its clients the subject company's response *which must be filed with the S.E.C.*!?!?! There is a "dramatic mismatch"[322] between the S.E.C.'s asserted problem and its compelled-speech solution. Furthering the irony, the S.E.C.'s lone safe harbor contemplated that a proxy advisor would send its clients a hyperlink to the subject company's supplemental proxy *that was filed with the S.E.C.* The S.E.C.'s logic and rule are internally inconsistent.

Granted, the subject company may not know which of its shareholders are clients of the proxy advisor,[323] so the subject company would have to alert *all* of its shareholders of its forthcoming response and provide that response to *all* of its shareholders, rather than targeting just the shareholders that were clients of the proxy advisor. Perhaps this was the reason that the S.E.C. repeatedly argued that its compelled-disclosure rule was "efficient"[324] in that it limited the notice and the response to those shareholders that received the proxy advisor's voting recommendations. But it is not efficient to compel a third party—the proxy advisor—

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[321] *Id.* § 240.14d-9(f) (2021) (addressing tender offers).

[322] Ams. For Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2386 (2021).

[323] The subject company will know the identity of certain large shareholders that are likely to be clients of proxy advisors. *See* 15 U.S.C. § 78m(d) (requiring disclosure by owner of more than five percent of a registrant's shares); Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6564, 6564 (Feb. 7, 2003) (codified at 17 C.F.R. pts. 239, 249, 270 & 274) (requiring disclosure of "how [the investment company] voted proxies relating to portfolio securities"). *See generally* Pioneer Nat. Res. Co., Proxy Statement (Schedule 14A) (May 13, 2016) (responding to adverse recommendations by two proxy advisors, but directly communicating with only "certain [stock]holders": "The following is the text of an email sent by Pioneer Natural Resources Company to certain holders of its common stock on May 13, 2016.").

[324] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55802, 55112 (Sept. 3, 2020) (to be codified at 17 C.F.R. pt. 240); *id.* at 55113. It is understandable the S.E.C. would focus on issues of "efficiency," given that Congress required it to do so when promulgating rules. *See* 15 U.S.C. § 78c(f).

to indirectly communicate a message from the subject company to its shareholders when that message could be communicated directly. Neither is it "transparent,"[325] another goal of the S.E.C.'s new regulation. To the extent that the S.E.C.'s rule is efficient in that it avoids the subject company from communicating its message to shareholders other than the proxy advisor's clients, the "efficiency" goal undermines other goals articulated by the S.E.C. For example, the S.E.C. sought to benefit all shareholders of the company that was subject to the proxy advisor's advice, not just the clients of those proxy advisors.[326] Why "enhanc[e] the total mix of information" available only to the clients of the proxy advisor,[327] when other shareholders would benefit from the subject company's response to an alternative view?[328] Importantly, the Supreme Court has rejected arguments that the government should be permitted to compel speech simply because the compelled speech is more "efficient" than alternatives.[329]

Aside from efficiency, the S.E.C. sought to expose the clients of a proxy advisor to additional views by compelling the proxy advisor to deliver to those clients the response of the subject company. First, it is not clear that the S.E.C.'s rule achieves that goal because the subject company may simply parrot disclosures previously made in its original proxy statement. The S.E.C.'s rule compels a proxy advisor to deliver to its clients "any written statement"[330] by the subject company, regardless of whether the subject company's statement actually "enhanc[es] the total mix of information available to [a proxy advisor's] clients."[331] Second, as stated above, the S.E.C. need not compel the proxy advisor to deliver those additional views of the subject company when the subject company can deliver those additional views directly to its shareholders. Again, why should the proxy advisor's clients be the only beneficiaries of the subject company's responsive, additional views? The Supreme Court has rejected such arguments. In *McIntyre*, the Supreme Court invalidated a compelled-speech regulation, the goal of which was to "provid[e] voters with additional relevant information."[332] In *Pacific Gas*, the Court determined that "the State's interest in promoting speech by making a variety of views available to appellant's customers . . . [wa]s not furthered by an order that [wa]s not content

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[325] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55082 ("adopting amendments to . . . rules governing proxy solicitations so that investors who use proxy voting advice receive more transparent, accurate, and complete information on which to make their voting decisions. . . ."); *see* Doe v. Reed, 561 U.S. 186, 198 (2010) ("[T]he State's interest in preserving electoral integrity is not limited to combating fraud [but also] extends more generally to promoting transparency and accountability in the electoral process . . . .").

[326] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55107.

[327] *Id.* at 55136.

[328] *See Reed*, 561 U.S. at 199 ("Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot."); Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2388 (2021) ("Our cases have said that disclosure requirements can chill [First Amendment rights] '[e]ven if there [is] no disclosure to the general public.'" (quoting *Shelton*, 364 U.S. at 486)).

[329] Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 795 (1988) ("[T]he First Amendment does not permit the State to sacrifice speech for efficiency.").

[330] 17 C.F.R. § 240.a-2(b)(9)(ii)(B) (2021).

[331] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55136.

[332] McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 348 (1995) ("The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.").

neutral. . . . The State [could] not advance some points of view by burdening the expression of others."[333]

Regarding the timing of the delivery of its voting recommendations to its clients, the proxy advisor must balance competing considerations. The earlier that it delivers its advice, the more likely that there will be a development that requires it to supplement that earlier advice. The later that it delivers its advice, however, the more likely that clients will ignore the advice, risking the cessation of their paid relationship. The practice of shareholders voting soon after hearing from their proxy advisors has a logical basis: Having already heard the voting recommendation of the subject company, the institutional shareholder votes soon after hearing a "second opinion" from a relatively objective third party—the proxy advisor. It is not clear that the shareholders would consider a last-minute response by the subject company in a world of bounded rationality.[334] The S.E.C.'s rationale reflected an unstated assumption: Once a shareholder casts a vote by proxy, the shareholder will not change that vote, even if the subject company offers a persuasive response to the proxy advisor's voting recommendations (even though one can execute a later-dated proxy that invalidates an earlier-dated proxy).

Further, if shareholders would consider a last-minute response by the subject company to the proxy advisor's later-than-ideal voting recommendations, and if time simply would not allow such a response, then the subject company could simply delay the meeting until it could address the proxy advisor's disclosure. If misleading disclosures by proxy advisors were rampant, then it would not be reasonable to expect subject companies time-and-time-again to delay their shareholder meetings, but the S.E.C. offered no persuasive evidence that such inaccurate, incomplete, or methodologically-weak disclosures are a pervasive problem. In the rare event that the subject company needed to respond, but lacked the time to respond, the subject company—consistent with federal and state law—could delay the meeting.[335] Plus, courts have delayed shareholders' votes to allow misleading statements—which might have negatively impacted the shareholders' votes—to dissipate and be corrected.[336]

As we have seen, the S.E.C.'s compelled-speech rule was unnecessary because any subject company could have engaged in counter speech, but the rule was also unnecessary because the S.E.C. could have engaged in its own speech.

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[333] Pac. Gas & Elec. Co. v. P.U.C. of Cal., 475 U.S. 1, 20 (1986) (plurality opinion); *see* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. Inc., 515 U.S. 557, 578 (1995) (refusing to compel inclusion of private party in parade when benefitted speaker could hold a parade of its own).

[334] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. at 55116. *See generally* Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518, 66546 (proposed Dec. 4, 2019) (to be codified at 17 C.F.R. pt. 240) ("[S]ome registrants may not file additional definitive proxy materials . . . if they do not think the effort would have a meaningful impact on votes.").

[335] *See, e.g.*, 17 C.F.R. § 240.14a-4(d)(2) (2021) (permitting proxy to be voted at the next annual meeting or any adjournment thereof); DEL. CODE ANN. tit. 8, § 212 (West 2021) (permitting proxies for more than one meeting). *See generally* Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1153 (Del. 1989) (addressing the delay of a corporation's meeting, which delay was motivated, in part, by shareholders' "ignorance").

[336] *In re* Topps Co. S'holder Litig., 926 A.2d 58, 63 (Del. Ch. 2007) ("[T]he moving parties have shown a likelihood of success on their claim that the Proxy Statement is materially misleading in its current form. The injunction that issues is warranted to ensure that the Topps stockholders are not irreparably injured by the loss of an opportunity to make an informed decision . . . .").

(3) The S.E.C.'s rule that compelled speech by proxy advisors was unnecessary because the S.E.C. could have engaged in that speech.[337] In *NIFLA*, where the government compelled content-based speech, the Court concluded that the regulation was not narrowly tailored, in part, because the government "could inform [the intended beneficiaries of the compelled speech] 'without burdening a speaker with unwanted speech.'"[338] In *Riley*, the Court invalidated a content-based compelled-speech regulation as not meeting exacting scrutiny because of the availability of "more benign and narrowly tailored options,"[339] such as the government itself publishing the information that it tried to compel a private party to communicate. "This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation."[340]

The government has also withstood constitutional challenge after imposing assessments on intended beneficiaries of compelled speech and using those funds to engage in government speech for their benefit.[341] The S.E.C. already collects fees from companies that sell stock to the public,[342] which are the companies that later solicit proxies from shareholders and that are the beneficiaries of the S.E.C.'s 2020 compelled-speech regulation. Having collected fees from such companies, the S.E.C. could use those fees to fund its own speech for their benefit, rather than compelling proxy advisors to communicate to their clients the messages of those companies.

The S.E.C. understandably may disfavor engaging in such speech, because it never found that a proxy advisor's speech is materially deficient or that the subject company's response should be adopted as the government's own speech.

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The fact that the S.E.C.'s imposition on proxy advisors—the sending of hyperlinks to their customers on those occasions that a subject company responds to their advice—was minimal does not enable it to survive exacting scrutiny. In *Pacific*

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[337] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005) ("Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech.").

[338] Nat'l Inst. of Fam. & Life Advocates v. Becerra, 138 S. Ct. 2361, 2376 (2018) (quoting Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 800 (1988)).

[339] *Riley*, 487 U.S. at 800.

[340] *Id.*

[341] *See Johanns*, 544 U.S. at 553 (addressing "whether a federal program that finances generic advertising to promote an agricultural produce violates the First Amendment" and concluding that "the generic advertising at issue is the Government's own speech and therefore is exempt from First Amendment scrutiny"); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 476–77 (1997) (concluding that federal orders that impose assessments on market participants to cover the cost of generic advertising by the government for their benefit do not violate the First Amendment).

In *Pacific Gas*, which involved a government-sponsored monopoly, the Court invalidated regulations that compelled the utility company to use its property to disseminate the views of a private party that conflicted with its own views, but a plurality of the Court noted that the government could achieve its goal of providing customers with competing views by imposing fees on the utility to cover the reasonable expenses of speech by third parties that would serve the public interest. Pac. Gas & Elec. Co. v. P.U.C. of Cal., 475 U.S. 1, 19 (1986) (plurality opinion). This aspect of *Pacific Gas* differs from the S.E.C.'s regulation, because there is no monopolistic proxy advisor and certainly no proxy advisor is government-sponsored. *See* Dent, Jr. *supra* note 57, at 1307–10.

[342] 15 U.S.C. § 77f.

Gas, the Court invalidated the compelled-speech regulation, even though it imposed no additional cost on the compelled speaker.[343] In concurring with the judgment, Justice Marshall noted that "the interference with appellant's speech [wa]s . . . very slight, [but] the State's justification . . . [wa]s insufficient to sustain even that minor burden."[344] In *Americans for Prosperity Foundation*, the Court invalidated a governmental regulation on facial grounds even though it merely required one to provide to the state government a form that had already been drafted and provided to the federal government.[345]

III. UNCONSTITUTIONALLY COMPELLED SPEECH REGARDING DIVERSITY

In the fall of 2020, shortly before the presidential election, the Republican-dominated S.E.C., by a vote of three to two, amended its rules to require reporting companies to disclose certain human-capital information,[346] but not numerical line-item disclosures regarding diversity that would have facilitated comparison across companies and industries.[347] After Joe Biden was elected president, Democrats took control of the S.E.C., when those two dissenting commissioners were joined by another Democrat—the new Chairman.[348] The newly-comprised S.E.C. issued its rule-making agenda, which indicated that it may compel reporting companies to disclose diversity information regarding their boards of directors and workforce.[349] The S.E.C. has not specified the bases on which one

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[343] *Pac. Gas & Elec. Co.*, 475 U.S. at 6 (addressing regulation that required "inclusion of other materials up to such total envelope weight as would not result in any additional postage cost" (quoting appendix)).

[344] *Id.* at 24 (Marshall, J., concurring).

[345] Ams. For Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2380 (2021) ("[T]he [California] Attorney General requires charities renewing their registrations to file copies of their Internal Revenue Service Form 990, along with any attachments and schedules."); *id.* at 2392 (Sotomayor, J., dissenting) ("Today, the Court holds that reporting and disclosure requirements must be narrowly tailored even if a plaintiff demonstrates no burden at all."); *id.* at 2395 (Sotomayor, J., dissenting) ("A reasonable assessment of the burdens imposed by disclosure should begin by determining whether those burdens even exist. If a disclosure requirement imposes no burdens at all, then of course there are no 'unnecessary' burdens.").

[346] Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63726, 63726 (Oct. 8, 2020) (to be codified at 17 C.F.R. pts 229, 239 & 240).

[347] Allison Herren Lee, Comm'r, SEC Regulation S-K and ESG Disclosures: An Unsustainable Silence (Aug. 26, 2020), https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26# [https://perma.cc/C5EC-Z5LB] ("The final rule the majority adopts today, however, is silent on . . . diversity . . . disclosures."); *id.* (objecting to the omission of specific-line-item disclosure on several topics including diversity); Caroline Crenshaw, Comm'r, SEC, Statement on the "Modernization" of Regulation S-K Items 101, 103, and 105, (Aug. 26, 2020), https://www.sec.gov/news/public-statement/crenshaw-statement-modernization-regulation-s-k [https://perma.cc/4DB6-2MAR] ("[T]he final rule is also silent on diversity, an issue that is extremely important to investors and to the national conversation."); *id.* (criticizing the "failure to adopt detailed, specific disclosure requirements concerning human capital"); *see* Self-Regulatory Organizations, 85 Fed. Reg. 80472, 80473 (Dec. 11, 2020) (noting that "investors are not able to readily compare board diversity statistics across companies").

[348] *See Current SEC Commissioners*, SEC (Dec. 29, 2020), https://www.sec.gov/Article/about-commissioners.html [https://perma.cc/H7V7-4D8B].

[349] Notice of Proposed Rule Making: Corporate Board Diversity, RIN: 3255-AL91, Office of Info. & Reg. Affairs (Spr. 2021), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AL91 [https://perma.cc/KH6F-73A7]; Notice of Proposed Rule Making: Human Capital Management Disclosure, RIN: 3255-AM88, Office of Info. & Reg. Affairs (Spr. 2021), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AM88

would be considered diverse, but this article assumes diversity would be based on gender, race/ethnicity, and sexual orientation, in light of recent amendments to NASDAQ's listing requirements[350] and to California's corporate code.[351]

A new S.E.C. rule that compels companies to report, for example, the composition of their boards and workforce along lines of gender, race/ethnicity, and sexual orientation would more closely resemble the conflict-minerals regulation of Part I than the proxy-advisor regulation of Part II. Like the conflict-minerals regulation, any such diversity disclosure appears to be factual, whereas the proxy-advisor regulation generally required the disclosure of a third party's opposing opinion. Unlike the conflict-minerals regulation—which had a humanitarian purpose, not an investor focus—compelled disclosure regarding diversity might serve both investors and social justice.[352] Moreover, the S.E.C. already compels disclosure of certain personal information regarding individual directors—including their age, their compensation, and certain litigation to which they are subject[353]—so, compelling aggregated disclosure regarding director (or workforce) diversity may simply be a logical extension of pre-existing disclosures. Nonetheless, the S.E.C. would be compelling disclosure on the basis of content, which invites First Amendment analysis.

A. Governmental Interests

Because the S.E.C. has not yet proposed a diversity disclosure rule, it has not articulated purposes for any such rule,[354] but one can project potential governmental interests.

[https://perma.cc/8VNL-NMQ7]; Gensler, *supra* note 12 (expressing consideration of human-capital disclosure, such as "workforce demographics including diversity").

[350] NASDAQ STOCK MKT. LLC r. 5605(f), 5606 https://listingcenter.nasdaq.com/rulebook/248asdaq/rules/248asdaq-5600-series [https://perma.cc/S9VM-94PP].

[351] CAL. CORP. CODE §§ 301.3, 301.4 (West 2021). The California legislation may fall for various reasons. First, the California legislation may fall to the extent that the state attempts to regulate corporations that are not organized under California law. *See* Edgar v. MITE Corp., 457 U.S. 624, 645 (1982) ("[O]nly one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands."). Second, the California legislation may fall on equal-protection grounds. *See* U.S. CONST. amend. XIV; Malathi Nayak, *California Push to Seat More Women on Boards Ruled Unlawful*, BLOOMBERG (May 16, 2022, 3:48 P.M.), https://www.bloomberg.com/news/articles/2022-05-16/248asdaq248nia-s-push-to-seat-more-women-on-boards-ruled-unlawful [https://perma.cc/MCF8-Y8CW].

[352] Lee, *supra* note 347 ("It has never been more clear that investors need information regarding, for example, how companies . . . prioritize diversity in the face of profound racial injustice."); Letter from Larry Fink, Chairman & CEO, BlackRock, to CEO (2021), https://www.blackrock.com/us/individual/2021-larry-fink-ceo-letter [https://perma.cc/B4NT-DP2M] ("We are also at a historic crossroads on the path to racial justice – one that cannot be solved without leadership from companies. A company that does not seek to benefit from the full spectrum of human talent is weaker for it – less likely to hire the best talent, less likely to reflect the needs of its customers and the communities where it operates, and less likely to outperform.").

[353] 17 C.F.R. §§ 229.401, 229.402 (2021).

[354] Amanda K. Packel, *Government Intervention into Board Composition: Gender Quotas in Norway and Diversity Disclosures in the United States*, 21 STAN. J.L. BUS. & FIN. 192, 233 (2016) (reviewing AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY (2015)) ("It is . . . not clear what the SEC's rationale would be for endorsing adoption of board diversity policies . . . .").

i. Prevent Materially Misleading Disclosures

In the securities realm, the S.E.C. commonly regulates to prevent materially misleading misstatements and omissions.[355] Corporations, however, generally remain silent regarding the diversity of their boards and workforce.[356] For the relatively few companies that affirmatively disclose diversity information regarding their boards and workforce,[357] there have been no claims of materially misleading disclosures of which I am aware. It is impossible to argue that there have been affirmative misstatements by the vast majority of companies because they remain silent regarding the diversity of their boards and workforce. Thus, the silence of the vast majority of companies would have to be materially misleading in itself.[358] Is silence regarding the diversity of a corporation's board or workforce materially misleading? Probably not. It is widely known that boards are predominantly white, heterosexual, and male,[359] so investors will assume that is the case for a corporation unless instructed otherwise. If investors or customers favor diversity, then a corporation with a diverse board and workforce will not remain silent regarding such information that favorably distinguishes itself from its competitors.[360] Instead, the corporation will voluntarily disclose such information.[361] In the absence of such voluntary disclosure, investors will assume the worst,[362] and not be misled by corporate silence. Because investors do not appear to be misled regarding the diversity of reporting companies' boards and workforce, the S.E.C. would not have strong footing to regulate on that basis.

ii. Curb Discrimination

The government has an interest in preventing, identifying, and disciplining employment discrimination on the basis of gender, race/ethnicity, and sexual orientation.[363] In contemplating a rule by the S.E.C. that compels disclosure of diversity information, one should be aware that the government already collects

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[355] *See, e.g.*, 17 C.F.R. § 240.14a-9 (2021) ("No solicitation subject to this regulation . . . which at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact . . . .").

[356] Self-Regulatory Organizations, 85 Fed. Reg. 80472, 80473 (Dec. 11, 2020) (noting that "investors are not able to readily compare board diversity statistics across companies"); *see* Packel, *supra* note 354, at 224 ("Only eight percent of companies explicitly disclosed having a policy regarding consideration of diversity in director selection.").

[357] *See, e.g.*, *Our Actions to Advance Racial Equity and Inclusion*, BLACKROCK (June 2, 2020), https://www.blackrock.com/corporate/about-us/social-impact/advancing-racial-equity [https://perma.cc/NHE2-63F6] ("Today, only 3% of our senior leaders (directors and above) and 5% of our workforce in the US are black.").

[358] *See* Basic v. Levinson, 485 U.S. 224, 239–40 (1988).

[359] *See* Thomas Lee Hazen & Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure*, 37 DAYTON L. REV. 39, 39–41 (2011). Aggregate data across large U.S. companies indicates that racial/ethnic makeup of the workforce resembles—but does not mirror—their representation in the U.S. populace. *See infra* note 372 (addressing all employee positions, whether low-level or officer-level).

[360] George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488 (1970); *see* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 280–83 (1991) (applying Akerlof's theories to securities markets).

[361] EASTERBROOK & FISCHEL, *supra* note 360, at 280.

[362] *See id.* (noting that the silent issuer of the best securities would be viewed as merely average).

[363] *See* 42 U.S.C. § 2000e-2; *see also* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020).

information from any reporting company regarding the gender and race/ethnicity (but not the sexual orientation) of its workforce (but not its board of directors) on the EEO-1 Report.[364] The EEOC uses that information to investigate charges of employment discrimination.[365] Because the EEOC makes available to the public only aggregate information, not company-specific information, the compelled disclosure is not intended to facilitate private litigation regarding employment discrimination.[366] Given that the compelled disclosure rules of the EEOC—which *is* charged with regulating employment discrimination—do not facilitate private litigation regarding employment discrimination, it would not make sense for the S.E.C.—which *is not* charged with regulating employment discrimination—to compel disclosure regarding workforce diversity to facilitate such private litigation. As to sexual-orientation diversity, the EEOC does not compel disclosure regarding that information to facilitate its own enforcement powers, much less facilitate private litigation, so, again, it would not make sense for the S.E.C. to compel disclosure of that information, where the governmental goal is addressing unlawful discrimination. With increasing frequency, the Supreme Court has reminded agencies to stay in their respective lanes.[367]

As to director-level diversity information, which is not required to be disclosed on the EEO-1 Report, claims of discrimination regarding the selection of directors seem problematic.[368] As a general matter, no corporate decision-maker hires directors in the sense that a corporate decision-maker hires each corporate employee.[369] Instead, shareholders elect directors,[370] and shareholders are free to

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[364] EEO-1 Report (Jan. 2008) [https://perma.cc/5CCR-SX4C]. Some advocate for updating the EEO-1 Report to collect additional information, such as sexual-orientation and nonbinary-gender information. *See* Natalie Runyon, *Pressure Mounts for EEOC's Disclosures on LGBTQ+ Employees' Status*, REUTERS (July 15, 2021, 3:24 PM), https://www.reuters.com/legal/legalindustry/pressure-mounts-eeocs-disclosures-lgbtq-employees-status-2021-07-15/ [https://perma.cc/AD6K-3NUK]. There may not be perfect overlap between the companies required to file an EEO-1 Report (private employers with 100 employees) and the companies that would be subject to the S.E.C.'s diversity disclosures (publicly-traded companies and companies with 2,000 shareholders and $10M in assets), but the overlap is near perfect. FREQUENTLY ASKED QUESTIONS—EEO-1 COMPONENT 1—DATA COLLECTION at 116, EEOC (Aug. 18, 2021), https://eeoc.org/pdfs/EEO-1%20Component%201%20FAQ.pdf [https://perma.cc/9QE8-6LQN]; 15 U.S.C. § 78m.

[365] FREQUENTLY ASKED QUESTIONS, *supra* note 364, at 6.

[366] *Id.*; *see* 42 U.S.C. § 2000e-8(e).

[367] *See, e.g.*, Nat'l Fed. of Ind. Bus. v. Dep't of Labor, 142 S. Ct. 661, 662–63 (2022) (per curiam) (concluding that OSHA exceeded its statutory authority when it mandated that employers with 100 employees get vaccinated because the Court expects Congress to speak clearly on issues of political significance).

[368] AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 62 (2015) ("[C]orporate board appointments fall outside the purview of U.S. civil rights legislation.").

[369] Some corporate decision-maker (typically a committee of the board) may identify nominees to be submitted shareholders for election. *See* DEL. CODE ANN. tit. 8, § 141(c) (West 2021); Board Affairs Committee Charter art. I, ExxonMobil (Nov. 1, 2017), https://corporate.exxonmobil.com/About-us/Who-we-are/Corporate-governance/ExxonMobil-board-of-directors/Board-affairs-committee-charter [https://perma.cc/F2S8-B74P]. The nominating committee of any reporting company must publicly disclose whether (and if so, how) it considers diversity when identifying nominees. *See* 17 C.F.R. § 229.407(c)(vi) (2021). If a shareholder is dissatisfied with an existing slate of nominees, the shareholder may nominate a rival slate of nominees. *See* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 837–38 (2005).

[370] *See, e.g.*, DEL. CODE ANN. tit. 8, § 216(3) (West 2021). Note that directors are empowered to fill mid-term board vacancies. *See id.* § 223.

elect directors for reasons of their choosing.[371] Whether or not there is unlawful discrimination in the election of directors, the government might seek to achieve equity, which is addressed in the next subsection.

iii. Achieve Equity and Inclusion

One might expect that the representation on boards of directors by women, racial/ethnic minorities, and those who identify as LGBT+ would resemble their representation among the overall populace.[372] Such is not the case. Women, who comprise slightly more than half of the U.S. population, occupy only twenty-seven percent of the board seats at corporations in the Russell 3000 stock index; racial and ethnic minorities comprise forty percent of the U.S. population but occupy less than fifteen percent of those board seats.[373] (Those who identify as LGBT+ comprise approximately five percent of the U.S. population;[374] LGBT+ representation on boards is generally unknown.[375]) By compelling diversity disclosure, the S.E.C.

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[371] *See* David A. Hoffman, *The "Duty" to be a Rational Shareholder*, 90 MINN. L. REV. 537, 597 (2006) ("[S]hareholders owe no duties.").

[372] Women appear underrepresented in the workforce. *See Job Patterns For Minorities And Women In Private Industry (EEO-1)*, EEOC, https://www.eeoc.gov/data/job-patterns-minorities-and-women-private-industry-eeo-1-0 [https://perma.cc/T9X9-KMXU] (providing data for 2018). Racial/ethnic minorities' representation among the workforce closely resembles—but does not mirror—their representation among the U.S. populace. *See id.*; *Quick Facts*, U.S. CENSUS BUREAU https://www.census.gov/quickfacts/fact/table/US/PST045221 [https://perma.cc/L9VN-54Z3].

Race/Ethnicity	Number of U.S. Employees (Rounded to the near hundred thousand)	Percentage of U.S. Employees	Percentage of U.S. Population
White	33.3 million	59.5%	60.1%
Black/African American	8.5 million	15.2%	13.4%
Hispanic	8.6 million	15.4%	18.5%
Asian	3.8 million	6.8%	5.9%
American Indian/ Alaska Native	0.3 million	0.5%	1.3%
Native Hawaiian/ Pacific Islander	0.3 million	0.5%	0.2%
Two or more races	1.2 million	2.1%	2.8%

[373] Peter Eavis, *Board Diversity Increased in 2021. Some Ask What Took So Long*, N.Y. TIMES (Jan. 3, 2022), https://www.nytimes.com/2022/01/03/business/corporate-boarddiversity.html [https://perma.cc/NZV6-EFH8]; Peter Eavis, *Diversity Push Barely Budges Corporate Boards to 12.5%*, N.Y. TIMES (Sept. 7, 2021), https://www.nytimes.com/2020/09/15/business/economy/corporate-boards-blackhispanic-directors.html [https://perma.cc/HJ99-ZS5V]; *see also* Self-Regulatory Organizations, 85 Fed. Reg. 80472, 80480 (Dec. 11, 2020) ("Overall in 2018, 83.9% of board seats among Fortune 500 companies were held by Caucasian/White individuals (who represent 60.1% of the U.S. population), 8.6% by African American/Black individuals (who represent 13% of the U.S. population), 3.8% by Hispanic/Latino(a) individuals (who represent 19% of the U.S. population) and 3.7% by Asian/Pacific Islander individuals (who represent 6% of the U.S. population).").

[374] Jeffrey M. Jones, *LGBT Identification Rises to 5.6% in Latest U.S. Estimate*, GALLUP (Feb. 24, 2021), https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx [https://perma.cc/PQ7F-RLFD].

[375] OUT LEADERSHIP, QUORUM: LGBT+ BOARD DIVERSITY AND DISCLOSURE GUIDELINES 10, https://www.insurance.ca.gov/diversity/41-ISDGBD/GBDExternal/upload/Quorum-Template-Board-Diversity-Guidelines-2019-Mar.pdf [https://perma.cc/KCC5-UYCP] ("[N]o comprehensive studies of LGBT+ membership

might seek to achieve equity and inclusion in board representation along the lines of gender, race/ethnicity, and sexual orientation, which was a goal of California's statutes and NASDAQ's rules.[376] In compelling diversity disclosure, however, the S.E.C. would be implementing a name-and-shame regulation.[377]

Consider NASDAQ's rule. The rule contemplates that a listed company's board will be comprised of a specified number of underrepresented individuals, and, if that number is not met, then the corporation must explain the insufficiency.[378] So, while the rule does not specifically mandate any particular board composition (because disclosure is an alternative), many corporations that have insufficiently diverse boards will feel compelled to comply.[379] Standing alone, disclosure may have the "indirect effect of increasing board diversity."[380] NASDAQ stated that its rule amounted to "one step in a broader journey to achieve inclusive representation across corporate America."[381] Its disclosure rule was intended to "influence corporate conduct,"[382] in that diversity would increase by compelling disclosure of the current composition of boards, which are predominantly white, heterosexual males.[383]

The S.E.C.'s disclosure regime, however, is intended to benefit investors, not aid underrepresented groups in attaining board seats.[384] Though attaining diversity on

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on Boards of directors of all U.S. companies has been conducted."); *id.* at 2 (noting that 0.3% of directors sitting on boards of Fortune 500 companies are "openly LGBT+").

[376] CAL. CORP. CODE § 301.3 (West 2021) (requiring minimum number of directors be "female," which means "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth"); *id.* § 301.4 (requiring minimum number of directors come from an "unrepresented community," which means "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender"); Press Release, Nasdaq to Advance Diversity through New Proposed Listing Requirements, NASDAQ (Dec. 1, 2020, 7:15 AM) ("[W]e believe this listing rule is one step in a broader journey to achieve inclusive representation across corporate America." (quoting Adena Friedman, Pres. & CEO, NASDAQ)).

[377] *See* Jesse M. Fried, *Will Nasdaq's Diversity Rules Harm Investors?*, 12 HARV. L. REV. ONLINE 1, 7 (2021) ("Nasdaq's rules . . . are designed to have this . . . 'naming and shaming' effect."); Richard W. Painter, *Board Diversity: A Response to Professor Fried*, 27 STAN. J.L. BUS. & FIN. 173, 219 (2021) (criticizing Fried's analysis but acknowledging that compelled disclosure of a lack of diversity has a "shaming" effect). *See generally* Nat'l Ass'n of Mfrs. v. S.E.C., 800 F.3d 518, 530 (D.C. Cir. 2015) (describing conflict-minerals rule as "requiring a company to publicly condemn itself"); Roberta S. Karmel, *Disclosure Reform—The SEC Is Riding Off in Two Directions at Once*, 71 BUS. LAW. 781, 796 (2016) (describing rule as "name and shame").

[378] NASDAQ STOCK MKT. LLC r. 5605(f)(2), https://listingcenter.nasdaq.com/rulebook/252asdaq/rules/252asdaq-5600-series [https://perma.cc/S9VM-94PP] (requiring any listed company to "have, or explain why it does not have, at least two members of its board of directors who are Diverse, including (i) at least one Diverse director who self-identifies as Female; and (ii) at least one Diverse director who self-identifies as an Underrepresented Minority or LGBTQ+").

[379] Fried, *supra* note 377, at 7 ("Many boards will feel that explaining their lack of diversity is not actually a feasible alternative to complying."); Painter, *supra* note 377, at 218 (arguing that a nondiverse board may generate "bad will" and become a "political target").

[380] Packel, *supra* note 354, at 235.

[381] Press Release, Nasdaq to Advance Diversity through New Proposed Listing Requirements, NASDAQ (Dec. 1, 2020, 7:15 AM), https://www.nasdaq.com/press-release/252asdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01 [https://perma.cc/4QJW-UBDN].

[382] Self-Regulatory Organizations, 85 Fed. Reg. 80472, 80496 (Dec. 4, 2020) ("[A] disclosure-based framework may influence corporation conduct . . . .")

[383] *Id.* at 80483–84.

[384] *See* Hazen & Broome, *supra* note 359, at 44 ("Although the securities laws can have an impact on shaping corporate governance, this is not their primary focus; corporate governance matters are generally left to state law . . . ."); *see also* Self-Regulatory Organizations, 85 Fed. Reg. at 80472 (discussing "social justice" and the

corporate boards is an admirable goal, it is not the goal of the S.E.C. or of the federal securities laws.[385] In other regards, the S.E.C. has implemented naming-and-shaming regulations. For example, the S.E.C. compels disclosure of interested-party transactions, which are transactions by those in control of the corporation that pose a high risk of loss to the corporation and its investors.[386] By naming-and-shaming, the S.E.C.'s compelled-disclosure rule discourages interested-party transactions and thereby benefits investors by decreasing that threat of loss. In that setting, however, the compelled disclosure is linked to the issue of valuation. As discussed in the next section, the evidence does not clearly support the proposition that diverse boards increase investor value.

iv. Address Value

Let me state up front—I believe that diversity adds value, but my belief is based upon intuition and studies that reveal a *correlation* between diversity and value, not a *causal* relationship. There's the rub, because the validity of any S.E.C. rule that compels such disclosure may hinge on the level of judicial scrutiny, where unsubstantiated beliefs could result in the rule's invalidation.[387] To highlight just one article about board-level diversity, noted feminist scholar Deborah L. Rhode and noted corporate governance scholar Amanda K. Packel concluded, "[a]fter exploring the strengths and limitations of various methodological approaches and survey findings, . . . that the relationship between diversity and financial performance has not been convincingly established."[388]

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The S.E.C. routinely mandates disclosures by reporting companies that directly address a company's value. For example, reporting companies must disclose their financial statements and the litigation to which they are subject.[389] If diversity directly addressed value, then compelled-disclosure regarding diversity would seem to fall within the S.E.C.'s discretion. Certainly, many have called for such disclosure—at least at the board level—including exchanges, investors, investment

"benefits to stakeholders," that is, not shareholders); *id.* at 80482 (referencing the "social justice movement"); Fried, *supra* note 377, at 2 ("[A]ppealing to social justice would not be enough . . . .").

[385] *See The Role of the SEC*, SEC, https://www.investor.gov/introduction-investing/investing-basics/role-sec [https://perma.cc/E4NZ-NABJ] ("The . . . SEC . . . has a three-part mission: Protect investors; Maintain fair, orderly, and efficient markets; [and] Facilitate capital formation."); Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1047 (2019) ("The United States' approach to securities regulation focuses on disclosure and is not merits-based."); Painter, *supra* note 377, at 219–22 (describing diversity, racial equality, and gender equality as ethical issues).

[386] *See* 17 C.F.R. § 229.404 (2021).

[387] *See* Nat'l Inst. of Fam. & Life Advocates v. Becerra, 138 S. Ct. 2361, 2377 (2018) ("purely hypothetical"); Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 811–12 (Rehnquist, C.J., dissenting) ("nothing but speculation"); Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 210 (1999) (Thomas, J., concurring) ("conjectural").

[388] Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make*, 39 DEL. J. CORP. L. 377, 377 (2014).

[389] 17 C.F.R. §§ 210, 229.103 (2021).

advisers, interest groups, and commentators.[390] Larry Fink—the founder, chairman, and chief executive officer of BlackRock, Inc., which manages more than $10 trillion, making it the largest investor in the world[391]—acknowledged that diversity is a "social issue," but suggested that it is also a value proposition.[392] Regarding its own diversity-disclosure rule, NASDAQ tried to make the latter case.[393] NASDAQ, however, immediately acknowledged that the "research suggest[s] a positive association between diversity and shareholder value,"[394] which is correlation, not causation. Scholars have reviewed the research on this topic and concluded that it does not support the claim that diversity improves shareholder value.[395]

NASDAQ tried to bolster its claim by arguing that diversity improves investor protection and board decision-making.[396] First, regarding investor protection, NASDAQ stated that "board diversity enhances the quality of a company's financial reporting, internal controls, public disclosures and management oversight."[397] The S.E.C. has previously crafted rules that directly regulate financial reporting, internal controls, and public disclosures.[398] The S.E.C. can simply enforce those pre-existing rules, each of which more directly addresses value, instead of indirectly addressing those issues of value by compelling disclosure of board diversity. Regarding oversight, substantive state corporate law governs,[399] and the Supreme Court has cautioned against the conversion of substantive state law claims regarding mismanagement into federal disclosure violations.[400] Moreover, enhanced oversight

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[390] NASDAQ STOCK MKT. LLC r. 5605(f), 5606, https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series [https://perma.cc/S9VM-94PP]; Letter from Larry Fink, Chairman & CEO, BlackRock, to CEO (2021), https://www.blackrock.com/us/individual/2021-larry-fink-ceo-letter [https://perma.cc/B4NT-DP2M;] OUT LEADERSHIP, *supra* note 375, *passim*; Packel, *supra* note 354, at 235; *see* INST. S'HOLDER SERVS., UNITED STATES: PROXY VOTING GUIDELINES 11–12 (Dec. 13, 2021) (recommending that clients vote against or withhold from the chair of a nominating committee for a company in the Russell 3000 or S&P 1500 indices if there are no women on the board or where the board has no apparent racially or ethnically diverse members), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf [https://perma.cc/6TGE-HQTK].

[391] *See* Andrew Ross Sorkin, *BlackRock's Message: Contribute to Society, or Risk Losing Our Support*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html [https://perma.cc/C4YL-QH3B]; Vivek Ramaswamy, *BlackRock's Climate-Crusade Doubletalk*, WALL ST. J. (Feb. 7, 2022) (updating the assets under management as of early 2022), https://www.wsj.com/articles/blackrock-climate-change-doubletalk-larry-fink-esg-exxon-warrior-met-coal-sasb-stakeholder-capitalism-11644167948 [https://perma.cc/9KEQ-BMJ5].

[392] Letter from Larry Fink, Chairman & CEO, BlackRock, to CEO (2021), https://www.blackrock.com/us/individual/2021-larry-fink-ceo-letter [https://perma.cc/B4NT-DP2M].

[393] Self-Regulatory Organizations, 85 Fed. Reg. 80472, 80475 (Dec. 11, 2020). Because the S.E.C. approved the proposal, the S.E.C. found NASDAQ's rationale persuasive. *See* 15 U.S.C. 78s(b).

[394] Self-Regulatory Organizations, 85 Fed. Reg. at 80475.

[395] Fried, *supra* note 377, at 5–7; Jonathan Klick, *Review of the Literature on Diversity on Corporate Boards* AM. ENTER. INST, Apr. 2021, at 2–17, https://www.aei.org/wp-content/uploads/2021/04/Review-of-the-Literature-on-Diversity-on-Corporate-Boards.pdf?x91208 [https://perma.cc/J75K-CCQS]; Packel, *supra* note 354, at 201; *see* Rhode & Packel, *supra* note 388, *passim* (reaching the same conclusion but reviewing studies several years before NASDAQ's proposal).

[396] Self-Regulatory Organizations, 85 Fed. Reg. at 80477, 80479.

[397] *Id.* at 80477.

[398] *See* 17 C.F.R. §§ 229.210, 230.10b-5, 240.13a-15, 240.240.15d-14, 240.15d-15 (2021).

[399] *See* Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362 (Del. 2006); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

[400] *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 477–80 (1977).

does not necessarily improve the value of the corporation.[401] Finally, according to NASDAQ, board diversity improves decision-making by reducing groupthink.[402] Critically, however, NASDAQ did not establish that improvements along any of those lines improved shareholder value.[403]

B. Judicial Scrutiny

If a court applied intermediate scrutiny as described in Parts I or II, then a rule compelling diversity disclosure would be at risk of invalidation. As described in Part III.A, the governmental interests appear speculative and are not narrowly tailored because the enforcement of pre-existing statutes and rules more directly addresses those governmental interests.

Some courts, however, have eschewed intermediate scrutiny when reviewing compelled factual commercial speech in favor of the deferential review of *Zauderer*.[404] In *Zauderer*, the Supreme Court concluded that the compelled disclosure of "purely factual and uncontroversial information" in the context of commercial advertising should not be subject to intermediate scrutiny.[405] Instead, the Court required such compelled disclosure simply be "reasonably related" to the government's interest in preventing the deception of consumers.[406] The periodic factual disclosures addressed in Parts I and III do not involve advertising because the reporting companies are not offering products, services, or securities.[407] For that reason, some courts have rejected the applicability of *Zauderer* and continue to apply intermediate scrutiny to compelled speech by reporting companies.[408] If, however, one acknowledges that compelled disclosures by reporting companies facilitate trading in the secondary markets (that is, the offer and sale of securities, even though the reporting company may not be a party to those transactions),[409] there remains the

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[401] *See* Fried, *supra* note 377, at 5 (noting that, while NASDAQ cited one research paper that supported the proposition that gender diversity improved oversight, NASDAQ neglected to report the paper's conclusion: "[T]he average effect of gender diversity on firm performance is negative."). *See generally* Ronald J. Gilson & Reinier Kraakman, *Reinvesting the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863, 873–74 & n.38 (1991) (discussing Dr. Suess's endless array of monitors).

[402] Self-Regulatory Organizations, 85 Fed. Reg. 80472, 80479 (Dec. 4, 2020).

[403] *See* Fried, *supra* note 377, at 5; KLICK, *supra* note 395, at 15–17. *See generally* Jens Frankenreiter, Cathy Hwang, Yaron Nili & Eric Talley, *Cleaning Corporate Governance*, 170 U. PA. L. REV. 1, 2 (2021) ("Correcting these errors substantially weakens one of the most well-known results in law and finance, which associates good governance with higher investment returns.").

[404] *See* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 26 (D.C. Cir. 2014) (en banc); Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 33 (2020) (arguing for rational basis review when the "[g]overnment regulates large for-profit corporate entities to express a message where the only harm would be dignitary in nature").

[405] Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 650–53 (1985).

[406] *Id.* at 651.

[407] For example, securities are offered under Section 5 of the Securities Act of 1933, not Section 13 of the Securities Exchange Act of 1934. *See* 15 U.S.C. §§ 77e, 78m. Note that a reporting company may incorporate its periodic filings from the latter act to fulfill disclosure obligations under the former act, but such incorporation is not required. *Compare* Form S-1, Item 12, 17 C.F.R. 239.11 (2021) (permitting, but not requiring, incorporation by reference), *with* Form S-3, Form 12, 17 C.F.R. 239.13 (2021) (requiring incorporation by reference).

[408] Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 521–22 (D.C. Cir. 2015).

[409] *Id.* at 535 (Srinivasan, J., dissenting).

problem of whether, as referenced in *Zauderer*, consumers are at risk of deception, which does not appear to be the case, as set forth in Part III.A.i. Nonetheless, some courts have extended the deferential review of *Zauderer* beyond problems of deception when addressing compelled commercial speech.[410]

Even if one makes those concessions, *Zauderer* still requires that the compelled disclosure be "purely factual and uncontroversial."[411] Perhaps some would disagree, but many view one's gender, race/ethnicity, and sexual orientation as *factual*.[412] That information, however, may be *controversial* in at least three regards. First, the D.C. Circuit concluded uncontroversial meant non-ideological.[413] Ideology seems at work when the government compels disclosure regarding protected status if such disclosure is intended to remedy historic discrimination not proven to be committed by the compelled speaker.[414] When analyzing the conflict-minerals compelled disclosure, the D.C. Circuit concluded that the name-and-shame regulation was unconstitutional when it was designed to stigmatize and shape behavior and when less constitutionally-suspect avenues were available.[415] Similarly, an S.E.C. diversity-disclosure rule would also "stigmatize and shape behavior" when less constitutionally-suspect avenues are available.[416] For example, the government could engage in its own speech, rather than compelling disclosure by reporting companies.[417]

The second theory by which the compelled disclosure would be *controversial* involves whether the compelled disclosure concerns a contested fact. Each of NASDAQ's rules and California's statutes involve the disclosure of *self-identified* information regarding one's gender, race/ethnicity, and sexual orientation.[418] Will

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[410] *See* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 20 (D.C. Cir. 2014) (en banc).

[411] Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

[412] Kim Parker, Juliana Horowitz & Anna Brown, *Americans' Complex Views on Gender Identity and Transgender Issues*, PEW RSCH. CTR. (June 28, 2022), https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues/ [https://perma.cc/8DY3-B7PT].

[413] *Nat'l Ass'n of Mfrs.*, 800 F.3d at 530; Shiffrin, *supra* note 6, at 1265–66 (arguing that the S.E.C.'s compelled-speech requirement regarding forward-looking statements complied with the First Amendment because there did "not seem to be grounds for believing that partisan interests . . . influenced the scope and kind of regulation . . . [as if it were a] Political Exchange Commission").

[414] *See Nat'l Ass'n of Mfrs.*, 800 F.3d at 537 (Srinivasan, J., dissenting) ("[T]he government cannot attempt to prescribe, under the guise of requiring disclosure of 'purely factual' information, 'what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" (quoting *Zauderer*, 471 U.S. at 651)). *See generally* Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (concluding that historic discrimination does not justify perpetual redressing).

[415] *Nat'l Ass'n of Mfrs.*, 800 F.3d at 530.

[416] *Id.*

[417] The government would have to collect from directors information regarding their diversity before it could be provided to the public. *See id.* at 556.

[418] *See* CAL. CORP. CODE § 301.3 (West 2021) (requiring a minimum number of directors to be "female," which means "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth."); *id.* § 301.4 (requiring a minimum number of directors to come from an "unrepresented community," which means "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender"); NASDAQ, INC., STOCK MKT. LLC Listing r. 5605(f)(1) ("'Diverse' means an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority, or LGBTQ+. 'Female' means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth. . . . 'LGBTQ+' means an individual who self-identifies as any of the following: lesbian, gay,

the S.E.C.'s disclosure rule similarly focus on self-identification? Consider the following: At birth, I presented as a male, and I still present as a male, but, if I identified as a female,[419] then the reporting company on whose board I served would treat me as a female when publicly reporting aggregate data regarding board diversity.[420] Setting aside the possibility that the reporting company might be subject to liability for a misleading disclosure, such disclosure would jeopardize the applicability of deferential review under *Zauderer* because the compelled disclosure would be *controversial*.[421] "[E]ven if the disclosure qualifies as 'purely factual,' it would still fall outside of *Zauderer* review if the accuracy of the particular information disclosed were subject to dispute."[422] Continuing the hypothetical, some would dispute the accuracy of my self-identification as a female.

Third, to the extent relevant under *Zauderer*'s *controversial* standard, the federal securities laws date back to the 1930s and neither Congress nor the S.E.C. has ever required such diversity disclosures. Recent congressional attempts to require such disclosures have failed.[423]

Finally, to the extent that the attainment of the government's interests requires public awareness of a board's diversity, then a compelled-disclosure rule may not result in the fulfillment of those interests. It seems unlikely that the S.E.C. could—or would try to—compel an individual to disclose one's sexual orientation.[424] Such

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bisexual, transgender, or as a member of the queer community. . . . 'Underrepresented Minority' means an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities."), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series [https://perma.cc/S9VM-94PP].

[419] Once viewed as binary, gender has become much more complicated. *See* Daniel Bergner, *The Struggles of Rejecting the Gender Binary*, N.Y. TIMES (June 4, 2019), https://www.nytimes.com/2019/06/04/magazine/gender-nonbinary.html [https://perma.cc/H7MM-ZV3A].

[420] Neither the NASDAQ rule nor the California code requires director-by-director disclosures regarding gender, race/ethnicity, or sexual orientation; the information is aggregated and disclosed without individual-identifying information. Although neither NASDAQ nor California requires disclosure of individual-identifying information, one might identify, for example, a board's single homosexual director by process of elimination, given that a board of directors typically is comprised of only a small number of individuals. *See* NASDAQ 5605; CAL. CORP. CODE §§ 301.3, 301.4.

[421] Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 524, 538 (D.C. Cir. 2015) (Srinivasan, J., dissenting).

[422] *Id.* (Srinivasan, J., dissenting); *see* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 250 (2010) (applying *Zauderer* "only [to] an accurate statement" of "factual information"); Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (stating that *Zauderer* would not apply when there is "disagree[ment] with the truth of the facts required to be disclosed"); Seana Valentine Shiffrin, *Compelled Speech and the Irrelevance of Controversy*, 47 PEPP. L. REV. 731, 762 (2020) (characterizing "controversial" as "contested fact" but ultimately rejecting that characterization).

[423] Gender Diversity in Corporate Leadership Act of 2017, H.R. 1611, 115th Cong. (2017) (requiring annual disclosure by reporting companies regarding gender composition of board members and board nominees); Improving Corporate Governance Through Diversity Act of 2019, S. 360, 116th Cong. (2019) (requiring annual disclosure by reporting companies of the composition of the board members and board nominees based upon voluntary self-identification of individual's race, ethnicity, and gender); Improving Corporate Governance Through Diversity Act of 2019, H.R. 1018, 116th Cong. (2019) (same); Improving Corporate Governance Through Diversity Act of 2019, H.R. 5084, 116th Cong. (2019) (same).

[424] *See* Kara Ingelhart, Jamie Gliksberg & Lee Farnsworth, *LGBT Rights and the Free Speech Clause*, 37 GPSOLO, Apr. 14, 2020, at 17, 20 ("LGBT people have a right not to be forced by their government . . . to disclose their gender identity or sexual orientation in contexts they would prefer not to."); *see also* Sterling v. Borough of Minersville, 232 F.3d 190, 196 (3d Cir. 2000) ("It is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity.").

information may be personal, and directors may be unwilling to share it publicly. Similarly, one may identify other than by the gender assigned at birth, which may also be personal, sensitive information that directors may be unwilling to share publicly.[425] Thus, NASDAQ allows for the possibility that individual directors may withhold information regarding their gender, race/ethnicity, or sexual orientation, in which case the corporation would simply identify the number of directors that withheld such information.[426] Withheld information regarding gender, race/ethnicity, and sexual orientation would not further the government's interests.

CONCLUSION

The S.E.C. has accorded too little weight to First Amendment concerns in its recent rulemaking. It should be more attuned to such concerns when promulgating new rules, in particular the contemplated diversity disclosures.

[425] *See* Powell v. Schriver, 175 F.3d 107, 111 (2d Cir. 1999) ("[T]he Constitution does indeed protect the right to maintain the confidentiality of one's transsexualism.").

[426] NASDAQ Inc., Listing Rules 5605(f)(1), 5606 https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series [https://perma.cc/S9VM-94PP].