

Nasdaq Petitions SEC to Act on Proxy Advisory Firms

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Nasdaq has filed a petition with the SEC on behalf of itself as a public company as well as its public company clients asking the SEC to take action on proxy advisory firms. The petition requests that the Commission or its staff revise the guidance that it previously gave for investment advisers to rely on those firms, in no-action letters, which we discussed [here](#). Nasdaq argues that future reliance on this relief should be conditioned on proxy advisory firms disclosing the models, formulas and methods they use to make voting recommendations and all relationships that could give rise to conflicts of interest.

Nasdaq outlines the proxy advisory firms' influence, with studies showing they affect as much as a quarter to half of votes cast, and contends that there is little transparency regarding the methodologies and models that make up the firms' recommendations and how they apply them to companies. The letter cites examples of companies that first had to speculate as to what ISS would allow in terms of share reserves for equity compensation plan proposals, and then were forced to quickly modify the proposal when faced with a negative ISS recommendation because the amount ran afoul of "ISS' proprietary secret formula."

As for conflicts, Nasdaq asserts that Glass Lewis has a "built-in" conflict due to its ownership by two entities, which make investments in companies on which Glass Lewis makes recommendations. Nasdaq also accuses ISS' business model of being inherently conflicted, since ISS acts as a consultant and advises companies on obtaining higher ISS ratings or sells the consultant's own proprietary models for getting favorable ISS recommendations. In addition, proponents of shareholder proposals or those who propose dissident director slates, on which ISS makes recommendations, may be clients of the firm.

Nasdaq urges the Commission to explore possible reforms, proclaiming that "[t]he time to study this issue has passed. The time to act is now."

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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