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GIBSON DUNN

Securities Regulation & Corporate Governance Update

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Texas Court Blocks Enforcement of New Texas Proxy Advisor Law Against ISS and Glass Lewis

In ISS' and Glass Lewis' challenges to a new Texas law that imposes disclosure obligations on proxy advisory firms related to certain advice to shareholders of Texas-based companies, a Texas federal court preliminarily enjoined enforcement of the law and set trial date for early February 2026.

On Friday, August 29, 2025, after a three-and-a-half-hour hearing, Judge Albright of the U.S. District Court for the Western District of Texas entered a preliminary injunction against Texas Senate Bill 2337 (SB 2337) in two lawsuits challenging the law, which will take effect on Monday, September 1, 2025—*Institutional Shareholder Services Inc. v. Paxton* and *Glass, Lewis & Co., LLC v. Paxton*. The Court's ruling blocks enforcement of SB 2337 by the Texas Attorney General against Institutional Shareholder Services Inc. (ISS) and Glass, Lewis & Co., LLC (Glass Lewis) while the cases proceed to discovery and trial, which the Court set for February 2, 2026. Of note, the order by Judge Albright does not enjoin the law with respect to other covered proxy advisors and enjoins actions by only the Attorney General.

SB 2337 will impose extensive public and directed disclosure obligations on proxy advisory firms when their recommendations or services are based on non-financial factors, which include environmental, social and governance (ESG) and diversity, equity and inclusion (DEI) considerations, diverge from company management's recommendations, or provide conflicting advice across clients. This law impacts proposals presented to shareholders of publicly traded Texas-based companies or those that have proposed to become Texas companies. A violation of

the law constitutes a deceptive trade practice under the Deceptive Trade Practices Act and is actionable by the company, its shareholders, the firm's clients, and the Attorney General. For a discussion of SB 2337, please see Gibson Dunn's prior Guide and Webcast about the recent changes in Texas law.

The Parties and Their Positions

ISS and Glass Lewis asserted several claims, some overlapping, in their attempts to invalidate SB 2337 (ISS docket) (Glass Lewis docket). ISS and Glass Lewis both argued that SB 2337:

- Violates the First and Fourteenth Amendments of the U.S. Constitution through compelled speech, content-based regulation of speech and viewpoint discrimination by forcing proxy advisors to state that recommendations inconsistent with management or incorporating ESG/DEI are not in shareholders' financial interest[1];
- Is unconstitutionally vague, given the undefined and/or politically charged terms of, for example, "nonfinancial factors," "financial interest," "ESG," and "DEI"; and
- Violates the Dormant Commerce Clause by regulating speech of out-of-state advisors to out-of-state clients when the subject company is, or intends to become, Texas-based.

Additionally, both ISS and Glass Lewis argued that SB 2337 is preempted. ISS argued that it is expressly preempted by the Investment Advisers Act of 1940 and Glass Lewis argued that it is expressly preempted by the Employee Retirement Income Security Act of 1974.

Attorney General Ken Paxton moved to dismiss both complaints, arguing that:

- Plaintiffs lack standing because SB 2337 has not yet been enforced;
- Sovereign immunity bars the suits;
- Proxy advisor speech is commercial in nature and subject only to rational basis or intermediate scrutiny under *Zauderer* and *Central Hudson*;
- SB 2337 is not vague and simply requires factual, noncontroversial disclosures; and
- To the extent provisions were problematic, they could be severed while leaving the statute largely intact.

On August 25, 2025, the Texas Stock Exchange (TXSE) and the Texas Association of Business (TAB) jointly intervened as defendants in the cases, arguing that they have direct and protectable interests at stake given their representation of Texas companies, a private right of action under SB 2337, and that their interests diverge from those of the Attorney General who may not need to defend the law on the merits.

The Alliance for Corporate Excellence filed amicus briefs in each of the Glass Lewis and ISS cases, generally supporting SB 2337 and characterizing it as a transparency requirement rather than a speech restriction.

The Hearing

The Court began the August 29th injunction hearing by agreeing that the plaintiffs have standing to sue and admitted the intervenors without discussion. The Court then heard extensive argument on the First Amendment and vagueness claims:

- **First Amendment**. Plaintiffs emphasized that SB 2337 forces them to adopt a state-scripted message directly contradicting their professional judgment and that it singles out certain speech based on viewpoint and content for regulation. They likened this to a "scarlet letter" requirement compelling them to announce publicly and to clients that their advice "subordinates shareholder financial interests" whenever ESG/DEI is considered or they recommend against management. The Attorney General countered that these were mere "factual disclosures" akin to securities regulations. Judge Albright accepted the plaintiff's argument they provide recommendations specifically solicited by clients, rather than factual statements that must be accompanied by a disclosure.
- **Vagueness**. Plaintiffs highlighted that terms such as "solely in the financial interest," "non-financial interest," "ESG," and "DEI" lack settled definitions. Because violations could trigger penalties of up to $10,000 per report and reports are distributed to thousands of clients, the statute exposed firms to potentially huge liability on a regular basis. The Attorney General responded that these terms are widely used in the industry and reasonably clear. The Court was sympathetic to the plaintiffs, emphasizing that the statute does not seem to indicate what would constitute a violation with sufficient particularity. ISS and Glass Lewis also explained that, due to the vagueness of the statute, nearly every recommendation they issue with respect to a Texas-based company would trigger SB 2337, requiring website disclaimers, notices to issuers and the Attorney General, and forced labeling of customized client recommendations as "conflicts," undermining their credibility and client relationships.

After hearing arguments from both plaintiffs, the Attorney General attempted to present its arguments and was questioned extensively by the Court over the purpose of the statute, how the statute would function, and who it would protect. The intervenors were questioned, as well, after describing the statute in a way the court believed was inconsistent with its actual language.

The Outcome and Order

At the end of the hearing, the Court ruled that ISS and Glass Lewis had met the standard for the issuance of a Preliminary Injunction and enjoined the "Attorney General and his agents, employees, and all persons acting under his direction or control from taking any action to enforce SB 2337 against [ISS and Glass Lewis], including but not limited to intervention in any private right of action."

While the Court issued the preliminary injunction only with respect to ISS and Glass Lewis, it is persuasive, though non-binding authority for any other advisor or service provider seeking a similar injunction against the Attorney General.

What to Watch Next

Judge Albright likely will issue a written order memorializing the rulings at the hearing and setting forth his reasoning. The Attorney General has the option to appeal to the Fifth Circuit for an emergency stay of the injunctions. If the Attorney General were successful in lifting the injunction on appeal, ISS and Glass Lewis would face compliance obligations while litigation proceeded on the merits.

The trial on the merits, scheduled for February 2026, will directly impact rules governing proxy advisory services in the next full proxy season. If SB 2337 or a modified version is ultimately upheld, proxy advisors will have to include disclaimers on a significant number of recommendations, notify issuers and the Attorney General of differing advice, and provide written economic analyses—all of which could alter the timing, content, and consistency of recommendations institutional investors rely upon. Conversely, if the injunction is affirmed and the law is struck down at trial, proxy advisors will continue under the limited existing federal framework without the state-imposed disclosure obligations.

We will continue to monitor the situation for developments.

[1] Glass Lewis also argued that SB 2337 violates the First and Fourteenth Amendments by infringing on its freedom of association by penalizing it for associating with a group that evaluates company value based on nonfinancial factors.

The following Gibson Dunn lawyers prepared this update: David Woodcock, Hillary Holmes, Gregg Costa, Colin Davis, Ronald Mueller, Gerry Spedale, Jason Ferrari, and Hayden McGovern.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, or any of the following lawyers in the firm's Securities Regulation & Corporate Governance, Securities Enforcement, or Securities Litigation practice groups:

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