

SENATE BILL No. 375

By Committee on Judiciary

1-22

AN ACT concerning consumer protection; relating to investments; enacting the proxy advisor transparency act; providing legislative findings and definitions; requiring proxy advisors to make certain disclosures when recommending an action against company management; authorizing the attorney general to investigate and take enforcement actions against violators; establishing a private right of action for a declaratory judgment or injunctive relief.

Be it enacted by the Legislature of the State of Kansas:

Section 1. The provisions of sections 1 through 6, and amendments thereto, shall be known and may be cited as the proxy advisor transparency act.

Sec. 2. The legislature of the state of Kansas finds the following:

(a) When shareholders hire professionals to manage investments, such shareholders reasonably expect that the service provider will perform those services in the financial interest of the shareholders, and that the service provider will make recommendations based on financial analysis of what actions would enhance investment value;

(b) there is a particular need for disclosures for proxy voting advice, because such advice is often provided for hundreds or thousands of shareholder votes each year and, with few investors having the resources to research every shareholder vote, investors often use proxy advisors for guidance on how to exercise fiduciary duties;

(c) many companies hire proxy advisors pursuant to the United States department of labor's long-standing conclusion that, under the employee retirement income security act, the "fiduciary obligations of prudence and loyalty to plan participants and beneficiaries require the responsible fiduciary to vote proxies on issues that may affect the value of the plan's investment";

(d) directors of publicly held companies owe fiduciary duties to shareholders and make recommendations in line with such fiduciary duties;

(e) nevertheless, proxy advisors have recommended votes against company management, including votes for shareholder proposals related to environmental, social or governance (ESG) issues, diversity, equity or inclusion (DEI) issues and social credit and sustainability scores, but have

1 not disclosed to clients that the recommendations were made without
2 conducting a financial analysis to determine how these votes would affect
3 shareholder value;

4 (f) the chief operating officer of Glass Lewis, a major proxy advisor,
5 stated under penalty of perjury that Glass Lewis does not conduct a written
6 financial analysis before recommending votes on shareholder proposals
7 and that other proxy advisors also do not do so. Proxy advisors, however,
8 have advertised that the purpose of their recommendations is maximizing,
9 increasing or protecting shareholder value;

10 (g) these facts raise concern that proxy advisors are engaged in
11 fraudulent or deceptive practices and are not disclosing material
12 information to their clients, who otherwise would reasonably believe that
13 they are choosing between recommendations of management and a proxy
14 advisor that are based on dueling financial analyses;

15 (h) investors purchasing proxy voting services should be informed
16 when recommendations against management are or are not being based on
17 financial analyses that consider the effect on the value of the plan's
18 investment. Investors also should be able to access such analyses upon
19 request in order to assess whether the analyses were sufficient to uphold
20 fiduciary standards;

21 (i) requiring proxy advisors to provide clear and factual disclosures
22 under these circumstances helps investors evaluate whether the proxy
23 advisor's recommendations uphold investors' fiduciary duties of prudence
24 and loyalty; and

25 (j) requiring proxy advisors to inform companies of these
26 recommendations also promotes disclosures in accordance with fiduciary
27 duties. An example of which is a company that is the subject of a
28 shareholder proposal often has additional information regarding whether a
29 proposal is in the shareholder's financial interests or regarding the costs of
30 a proposal, and notice of a proxy advisor's recommendation allows the
31 company to provide additional responsive information to shareholders
32 seeking to uphold their fiduciary duties.

33 Sec. 3. As used in this act:

34 (a) "Act" means the proxy advisor transparency act.

35 (b) "Company" means a publicly traded, for-profit corporation,
36 limited liability company, partnership or other business entity.

37 (c) "Company proposal" means any proposal made by a company to
38 such company's shareholders that is included in the company's proxy
39 statement, including, but not limited to, director nominations or elections,
40 or any proposal relating to director nominations or elections, executive
41 compensation, corporate transactions, corporate structure, auditor selection
42 or company policy on any subject.

43 (d) "Default recommendation or policy" means a system, set of rules,

1 principles or guidelines designed to assist with voting decisions on any
2 company proposals or proxy proposals.

3 (e) "Proxy advisor" means a person who, for compensation, provides
4 a proxy advisory service to shareholders of a company or to other persons
5 with authority to vote on behalf of the shareholders of a company.

6 (f) "Proxy advisory service" means any of the following services that
7 are provided in connection with or in relation to a company, or are
8 provided to any person in this state:

9 (1) Advice or a recommendation on how to vote on a company
10 proposal or proxy proposal;

11 (2) proxy statement research and analysis regarding a company
12 proposal or proxy proposal; or

13 (3) development of proxy voting recommendations or policies,
14 including establishing default recommendations or policies.

15 (g) "Proxy proposal" means any proposal made by a shareholder of a
16 company that is included in the company's proxy statement or has been
17 submitted for inclusion in the company's proxy statement, including, but
18 not limited to, a proposal relating to any of the subjects that could be
19 covered by a company proposal.

20 (h) "Shareholder" means a shareholder, unitholder, limited partner or
21 other equity owner of a company.

22 (i) "Written financial analysis" means a written document that:

23 (1) Analyzes the expected short-term and long-term financial benefits
24 and costs to the company regarding the implementation of a company
25 proposal or proxy proposal;

26 (2) concludes what vote or course of action is most likely to
27 positively affect shareholder value; and

28 (3) explains the methods and processes used to prepare the analysis,
29 including the experience and geographic location of the personnel who
30 formed the recommendation.

31 Sec. 4. (a) If a proxy advisor makes a recommendation against
32 company management on a company proposal or proxy proposal, or makes
33 a default recommendation or policy involving votes against company
34 management on company proposals or proxy proposals, and such proxy
35 advisor does not make such recommendation based on a written financial
36 analysis, such proxy advisor shall:

37 (1) Concurrently with providing the proxy advisory service, include a
38 clear and conspicuous disclosure to each shareholder, or entity or other
39 person acting on behalf of a shareholder, receiving the proxy advisory
40 service that:

41 (A) Identifies the service being provided;

42 (B) identifies the recommendation or policy at issue; and

43 (C) states that the proxy advisor has made the recommendation or

1 policy without basing such recommendation on a written financial analysis
2 regarding the impact of such recommended action on company investors
3 that:

4 (i) Analyzes the expected short-term and long-term financial benefits
5 and costs to the company regarding the implementation of the company
6 proposal or proxy proposal;

7 (ii) concludes what vote or course of action is most likely to
8 positively affect shareholder value; and

9 (iii) explains the methods and processes used to prepare the analysis,
10 including the experience and geographic location of the personnel who
11 formed the recommendation;

12 (2) provide, concurrently with providing a proxy advisory service
13 under section 3(f)(1) or (2), and amendments thereto, the disclosure under
14 subsection (a)(1) to the board of directors of each company that is the
15 subject of the proxy advisory service; and

16 (3) while any proxy advisory services are being provided, publicly
17 and conspicuously disclose on the home or front page of the proxy
18 advisor's website a statement that the proxy advisor's proxy advisory
19 services include one or more services that include recommendations or
20 policies against company management on company proposals or proxy
21 proposals that are not made based on a written financial analysis regarding
22 the impact of such recommended action on company investors that:

23 (A) Analyzes the expected short-term and long-term financial
24 benefits and costs to the company regarding the implementation of the
25 company proposal or proxy proposal;

26 (B) concludes what vote or course of action is most likely to
27 positively affect shareholder value; and

28 (C) explains the methods and processes used to prepare the analysis,
29 including the experience and geographic location of the personnel who
30 formed the recommendation.

31 (b) If a proxy advisor makes a recommendation against company
32 management on a company proposal or proxy proposal, or makes a default
33 recommendation or policy involving votes against company management
34 on company proposals or proxy proposals, and such proxy advisor makes
35 such recommendation based on a written financial analysis, such proxy
36 advisor shall:

37 (1) Concurrently with providing the proxy advisory service, include a
38 clear and conspicuous disclosure to each shareholder, or entity or other
39 person acting on behalf of a shareholder, receiving the proxy advisory
40 service that:

41 (A) Identifies the proxy advisory service being provided;

42 (B) identifies the recommendation or policy at issue;

43 (C) states that the proxy advisor has made the recommendation or

1 policy based on a written financial analysis that:

2 (i) Analyzes the expected short-term and long-term financial benefits
3 and costs to the company regarding the implementation of the company
4 proposal or proxy proposal;

5 (ii) concludes what vote or course of action is most likely to
6 positively affect shareholder value; and

7 (iii) explains the methods and processes used to prepare the analysis,
8 including the experience and geographic location of the personnel who
9 formed the recommendation; and

10 (D) states that the analysis is available upon request;

11 (2) make such analysis available within a reasonable time to any
12 client of the proxy advisory service upon request; and

13 (3) provide, concurrently with providing a proxy advisory service
14 under section 3(f)(1) or (2), and amendments thereto, a copy of such
15 analysis to the board of directors of each company that is the subject of the
16 service.

17 Sec. 5. (a) A violation of this act is a deceptive and unconscionable
18 act or practice under the Kansas consumer protection act and shall be
19 subject to any and all of the enforcement provisions of the Kansas
20 consumer protection act. The attorney general may exercise all
21 investigative powers under the Kansas consumer protection act if the
22 attorney general has reason to believe that a violation has occurred, is
23 occurring or is about to occur.

24 (b) For the purposes of the remedies and penalties provided by the
25 Kansas consumer protection act:

26 (1) The person committing the conduct prohibited by this act shall be
27 deemed the supplier, and the person who is the victim of such conduct
28 shall be deemed the consumer; and

29 (2) proof of a consumer transaction shall not be required.

30 (c) In addition to enforcement under subsection (a), any person
31 aggrieved by a violation of this act may bring an action seeking a
32 declaratory judgment or injunctive relief against a proxy advisor who
33 violates this act. Not later than the seventh calendar day after the date on
34 which an action is brought under this subsection, the plaintiff shall provide
35 written notice to the attorney general, who shall have a right to intervene
36 in the action. For purposes of this section, an aggrieved person includes:

37 (1) A recipient of proxy advisory services provided by the proxy
38 advisor;

39 (2) a company that is the subject of a proxy advisory service under
40 section 3(f)(1) or (2), and amendments thereto, provided by the proxy
41 advisor; or

42 (3) any shareholder of a company under subsection (c)(2).

43 Sec. 6. The provisions of this act are severable. If any portion of the

1 act is declared unconstitutional or invalid, or the application of any portion
2 of the act to any person or circumstance is held unconstitutional or invalid,
3 the invalidity shall not affect other portions of the act that can be given
4 effect without the invalid portion or application, and the applicability of
5 such other portions of the act to any person or circumstance shall remain
6 valid and enforceable.

7 Sec. 7. This act shall take effect and be in force from and after its
8 publication in the statute book.