Testimony of

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"Exposing the Proxy Advisory Cartel: How ISS & Glass Lewis Influence Markets"

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Good afternoon Chair Wagner, Ranking Member Sherman, and members of the Subcommittee on Capital Markets. My name is Charles Crain, and I am the Managing Vice President of Policy at the National Association of Manufacturers. On behalf of the NAM's 14,000 members and the 13 million people who make things in America, I appreciate the opportunity to testify before you today to illustrate the impact that the entrenched proxy firm duopoly has on manufacturers of all sizes—and to make the case for urgent action by Congress and the Securities and Exchange Commission to rein in these powerful market actors.

Proxy firms set corporate governance standards for publicly traded companies, and they provide voting recommendations based on those standards to institutional investors who vote at public companies' annual meetings. Proxy firms have substantive beliefs and normative agendas about how public companies should be run. In other words, they are not disinterested third parties; rather, they seek to guide corporate behavior to align with their own interests. Further, proxy firms do not have a fiduciary duty to the underlying investors in America's public companies—teachers, firefighters, and manufacturing workers saving for a secure retirement—so they are free to exert their outsized influence as they see fit. They do so by recommending that institutional investors vote in accordance with their pre-set, one-size-fits-all voting guidelines.

Proxy firm "recommendations" are no mere suggestions, however. Rather, institutional investors—who *do* have a fiduciary duty to the Main Street investors whose assets they manage—generally vote in lockstep with the proxy firms' recommendations, and in many cases the proxy firms actually cast votes on institutions' behalf via their automated "robo-voting" services. This degree of influence over companies' proxy voting results means that ISS and Glass Lewis—the two major proxy firms, which together control over 97% of the U.S. proxy advice market—effectively dictate corporate governance policies for America's capital markets.

This is because proxy firms directly control a significant percentage of the shareholder vote. ISS, for instance, can affect support for a dissident slate of board nominees by 73% and support for an

uncontested director by 18%.[1] A study conducted during the SEC's consideration of proxy reforms found that 175 institutions, with more than $5 trillion in assets under management, vote in lock step with proxy firms more than 95% of the time.[2] Companies are thus forced to treat proxy firms as quasi-regulators, adjusting company policies and making disclosures to satisfy the firms in order to avoid negative recommendations on critical corporate matters—and, increasingly, on environmental and social topics outside the realm of traditional corporate governance.

Indeed, proxy firms have policies and provide recommendations on a wide range of ESG topics, which may or may not be relevant to an individual company's growth and the value it creates for shareholders. Studies have shown that proxy firms are overwhelmingly supportive of activists' ESG proposals; for example, ISS recommended in favor of nearly 80% of environmental and social proposals during the 2023 proxy season.[3] A 2022 NAM survey found that nearly 78% of publicly traded manufacturers were concerned that this increased pressure on ESG topics from proxy firms and other third parties will "increase costs for public companies, divert management and board time and resources, and endanger long-term value creation."[4]

Powerful market actors with this degree of influence should clearly be subject to appropriate government oversight. But in the case of proxy firms, the case for regulatory guardrails is even stronger. Their consulting services present an obvious conflict of interest. Their inflexible policies do not account for the individual circumstances of disparate companies and their investors, and they are developed with minimal transparency or stakeholder input. And proxy firms have been unwilling to engage with companies to correct errors, reconsider misleading assumptions, or re-examine how their recommendations might impact the business in question. Yet, despite years of effort by both Congress and the SEC, proxy firms remain stubbornly unregulated.

I. The combination of proxy firms' outsized influence and the risks to investors endemic to their business model presents a clear case for robust oversight of these powerful actors.

Conflicts of Interest

First and foremost, ISS operates a consulting service through which it offers guidance to companies on the very topics that will be the subject of ISS's voting recommendations. This consulting service advises companies on how to structure their equity plans and corporate governance policies in alignment with ISS's preferred view of how public companies should be run. The main benefit of this "advice" for public companies is that it helps them avoid adverse vote recommendations—*from ISS's proxy voting business*. The conflicts endemic to these related business offerings are clear: if companies pay ISS's fee, they can feel confident in avoiding negative ISS recommendations; if they choose not to pay the fee, then they can expect ISS's voting recommendations to enforce ISS's preferred policies at the company's expense. Indeed, ISS's consulting service has been known to point to negative recommendations and/or shareholder votes against a board-endorsed position (often driven by a negative recommendation) on a previous year's proxy ballot as evidence that its

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[1] Larcker, David F., Brian Tayan and James R. Copland, *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry* (14 June 2018). Harvard Law School Forum on Corporate Governance. *Available at* https://corpgov.law.harvard.edu/2018/06/14/the-big-thumb-on-the-scale-an-overview-of-the-proxy-advisory-industry/.

[2] Doyle, Timothy M., *The Realities of Robo-Voting* (9 November 2018). American Council for Capital Formation. *Available at* https://accfcorpgov.org/wp-content/uploads/ACCF-RoboVoting-Report_11_8_FINAL.pdf.

[3] *Voting Matters 2023* (11 January 2024). ShareAction. *Available at* https://cdn2.assets-servd.host/shareaction-api/production/resources/reports/ShareAction_Voting-Matters_2023_2024-06-25-145106_jwpq.pdf.

[4] NAM Manufacturers' Outlook Survey, Fourth Quarter 2022 (4 January 2023). *Available at* https://www.nam.org/wp-content/uploads/2023/01/Manufacturers_Fourth_Quarter_Outlook_Survey_December_2022.pdf.

services are needed. Thus, companies are effectively forced to pay into this broken system to understand ISS's models and methodologies (about which the firm is persistently opaque) and to avoid negative recommendations that will distract time, effort, and capital from more productive uses.

Glass Lewis is not immune from its own conflicts of interest. Though it does not operate a consulting service for companies, it recently established a Stewardship Solutions program that provides engagement advice to activists who are trying to influence corporate practices via shareholder proposals and other campaigns—each of which, of course, will ultimately be subject to a vote recommendation from Glass Lewis's proxy voting service. Glass Lewis's participation in these efforts gives it an incentive to recommend in favor of its investor-clients' preferred policies or proposals—irrespective of their potential impact on companies or shareholders.

Policy Development and Issuer Engagement

Proxy firms insist upon a one-size-fits-all approach to corporate governance that does not take into account differences in companies' business models and the flexibility allowed under securities law. Take, for example, proxy firms' insistence that companies hold say-on-pay votes on executive compensation every year. The Dodd-Frank Act explicitly allows company shareholders to choose to hold such votes every one, two, or three years—but the proxy firms have chosen to override Congress and will only recommend in favor of annual votes. The firms' beliefs on the "right" way to govern a public company, which in recent years increasingly includes a normative ESG agenda, are embedded in the firms' benchmark voting guidelines, which are used to build voting recommendations for every proxy vote at every public company. These benchmark policies guarantee that the firms' policy preferences are carried out via the voting power of the trillions of dollars of investor shares held by the institutions that follow ISS and Glass Lewis.

Though the firms do offer minor modifications to their benchmark policies—such as a "socially responsible" framework or a Taft-Hartley-focused framework—these additional models are highly aligned with the benchmark model, even if not marketed as such. For example, ISS in 2023 began offering a so-called "board-aligned" policy following investigations into its voting power by Republican attorneys general from across the country. Based on its name, one would have expected the policy to vote in line with recommendations made by corporate boards—a theoretically valuable framework for investors that trust the duly nominated and elected board members of a company to live up to their fiduciary duty to act in shareholders' best interests. ISS's "board-aligned" policy, however, only aligns with boards of directors on certain environmental and social shareholder proposals. Otherwise, it duplicates the recommendations made by ISS's benchmark policy—very often in *opposition* to the boards with which it is allegedly "aligned." This dynamic is replicated across many of the custom policies that the firms offer. In other words, the firms' benchmark policies—which reflect their idiosyncratic preferences with respect to corporate governance, ESG issues, and more—carry tremendous weight for governance decisions made by businesses and their shareholders throughout the economy.

In addition to enforcing strict preferences about public company governance, proxy firm reports and recommendations often feature errors and misleading statements, ranging from specific incorrect facts to disingenuous assumptions about, for instance, a company's peer group or compensation practices. Worse, proxy firms have been steadfastly resistant to allowing companies to review their draft recommendations in order to flag mistakes, and they historically have been reluctant to engage in a productive dialogue with companies to correct any errors, misunderstandings, or misrepresentations.

Prior to 2021, ISS did offer limited issuer engagement opportunities: it allowed companies in the S&P 500 to review and provide some feedback on its draft voting recommendations. It offered this service

"to help check the factual accuracy of the data underpinning [its] research"[5]—a laudable goal, and one which clearly was undermined by ISS's decision to rescind the program following the finalization of the SEC's 2020 proxy firm rule. Glass Lewis, on the other hand, did not offer issuer review prior to the 2020 rule, but after the rule's finalization Glass Lewis launched its Report Feedback Statement program, which allows companies to respond to a Glass Lewis recommendation—if they have paid a fee to access the recommendation in the first place.

Robo-Voting

Proxy firms' robo-voting services allow them to automatically cast votes on their clients' behalf—in line with the proxy firm's recommendations and without any review by either the investment manager or the underlying beneficiary. As former SEC Commissioner Elad Roisman has noted, these "set-it-and-forget-it" mechanisms are generally not well understood by the investors whose shares are being voted, nor are they always consistent with an investment adviser's fiduciary duties.[6] Indeed, robo-voting translates proxy firms' policy beliefs directly into greater voting power, completely cutting investment advisers and their clients out of the process. This automated voting also deprives companies of a chance to correct mistakes or provide investors with additional information before votes are cast.

While proxy firms' voting infrastructure can be useful to large institutions charged with voting proxies at hundreds of companies, the firms' ability to cast votes on those investors' behalf illustrates both their unchecked power in the market and the risks they pose to investment managers' fiduciary duty. Indeed, in guidance issued by the SEC under former Chairman Jay Clayton, the Commission encouraged investment advisers to take specific steps to ensure that proxy votes are cast in investors' best interests—including by affirmatively reviewing proxy ballots pre-populated by a proxy firm rather than allowing them to be automatically cast and by considering all relevant information that could impact a vote, even if it becomes available after votes are cast.[7] Both of these guidelines are inconsistent with how robo-voting is generally practiced and likely would necessitate additional due diligence on asset managers' part to mitigate the risks posed by robo-voting—though, unfortunately, the SEC under then-Chairman Gary Gensler rescinded the Clayton-era robo-voting guidance.

II. The SEC has taken steps to institute commonsense guardrails for proxy advisory firms—though the Commission's defense of its authority was undermined during the previous Administration and is being challenged by ISS.

In 2020, the SEC finalized a long-awaited rule to provide appropriate oversight of proxy advisory firms.[8] The 2020 rule, developed over the course of a decade, instituted commonsense safeguards designed to increase transparency into these powerful actors. In particular, the rule required proxy firms to provide copies of their final recommendations to companies and to have a mechanism in place by which investors could become aware if a company submitted a response to the firm's

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[5] *Company Letter Ending U.S. Draft Reviews*. Institutional Shareholder Services (2 November 2020). *Available at* https://www.issgovernance.com/file/publications/202011102_Company_Letter_Ending_US_Draft_Reviews_CA_companies.pdf.

[6] *Speech at the Council of Institutional Investors' Conference* (10 March 2020). Commissioner Elad L. Roisman. *Available at* https://www.sec.gov/news/speech/speech-roisman-cii-2020-03-10.

[7] *Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, 85 Fed. Reg. 55155 (3 September 2020). Release No. IA-5547; *available at* https://www.govinfo.gov/content/pkg/FR-2020-09-03/pdf/2020-16338.pdf.

[8] *Exemptions From the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55082 (3 September 2020). Release No. 34-89372; *available at* https://www.govinfo.gov/content/pkg/FR-2020-09-03/pdf/2020-16337.pdf.

recommendation. It also required proxy firms to disclose their conflicts of interest and clarified that proxy firms are subject to the proxy solicitation rules' antifraud standards. Alongside the final rule, the SEC issued guidance to asset managers outlining instances in which relying on proxy firms' robo-voting services instead of reviewing all information available to them and making an informed voting decision could implicate their fiduciary obligations to Main Street investors.[9]

Notably, the 2020 rule's issuer engagement requirements were significantly less strict than what the SEC had proposed in 2019.[10] The 2019 proposal would have required proxy firms to allow companies to review and provide feedback on their *draft* reports.[11] Proxy firms also would have been required to disseminate company responses to their clients alongside their voting advice. The NAM strongly supported, and continues to support, the draft review and feedback provisions from the 2019 proposal. Indeed, a draft review process for all public companies would represent a significant step toward transparency and accountability for proxy firms, as the opportunity for companies to review draft reports, identify potential mistakes, and respond to any misrepresentations or disagreements before investors start voting would significantly improve the accuracy of proxy voting advice and enhance the amount of relevant information available to investors.

Despite the compromise nature of the 2020 reforms, the SEC in 2021 began to take steps to dismantle this important progress. In a series of coordinated actions in June 2021, then-Chairman Gary Gensler announced that the SEC would "revisit" the 2020 rule,[12] the Division of Corporation Finance suspended enforcement of the rule,[13] and the SEC granted ISS "relief" from the rule's requirements.[14] In a lawsuit brought by the NAM before the U.S. District Court for the Western District of Texas, the court found that, via these coordinated actions, the SEC violated the Administrative Procedure Act by suspending the rule outside the notice-and-comment process.[15]

In 2022, the SEC finalized a rule unlawfully rescinding critical portions of the 2020 rule—including the compromise requirement that proxy firms share their recommendations with impacted companies after they are finalized and take steps to ensure that investors have access to any company responses to those recommendations.[16] At the same time, the SEC also rescinded the robo-voting guidance that had been finalized concurrent with the 2020 rule, which cautioned asset managers against outsourcing their voting authority to the firms. Manufacturers strongly opposed

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[9] *See* Robo-Voting Guidance, *supra* note 7.

[10] *See Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice*, 84 Fed. Reg. 66518 (4 December 2019). Release No. 34-87457; *available at* https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-24475.pdf.

[11] *See Concept Release on the U.S. Proxy System*, 75 Fed. Reg. 42982 (22 July 2010). Release Nos. 34-62495; IA-3052; IC-29340, *available at* https://www.govinfo.gov/content/pkg/FR-2010-07-22/pdf/2010-17615.pdf. For instance, the Concept Release observes that proxy firms "may be unwilling, as a matter of policy, to accept any attempted communication from the issuer or to reconsider recommendations in light of such communications" and notes that "issuers have expressed a desire to be involved in reviewing a draft of the proxy advisory firm's report, if only for the limited purpose of ensuring that the voting recommendations are based on accurate issuer data" (at 43012).

[12] *Statement on the Application of the Proxy Rules to Proxy Voting Advice*. Chairman Gary Gensler (1 June 2021). *Available at* https://www.sec.gov/news/public-statement/gensler-proxy-2021-06-01.

[13] *Statement on Compliance with the Commission's 2019 Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice and Amended Rules 14a-1(1), 14a-2(b), 14a-9.* SEC Division of Corporation Finance (1 June 2021). *Available at* https://www.sec.gov/news/public-statement/corp-fin-proxy-rules-2021-06-01.

[14] *See* Mtn. for Abeyance, *Institutional Shareholder Services Inc. v. SEC*, No. 19-cv-3275 (D.D.C.).

[15] *Nat'l Ass'n of Mfrs. v. SEC*, 631 F.Supp.3d 423 (W.D. Tex. 2022).

[16] *Proxy Voting Advice*, 87 Fed. Reg 43168 (19 July 2022). Release Nos. 34-95266, IA-6068; *available at* https://www.govinfo.gov/content/pkg/FR-2022-07-19/pdf/2022-15311.pdf.

these rescissions.[17] The SEC's actions to rescind the 2020 rule were vacated in a lawsuit brought by the NAM before the U.S. Court of Appeals for the Fifth Circuit, which held that the SEC's actions were "facially irrational" and not "reasonable or reasonably explained."[18]

As the Gensler SEC sought to undo the substance of the 2020 rule, the SEC was at least defending in court its authority to provide some degree of oversight of proxy firms. Shortly after the promulgation of the SEC's 2019 guidance clarifying that proxy voting advice generally constitutes a solicitation under the Exchange Act and thus that proxy firms were subject to existing antifraud standards under the proxy solicitation rules, ISS filed suit against the SEC. ISS expanded its lawsuit after the 2020 rule was finalized, seeking to nullify the rule and to undermine the SEC's ability to regulate proxy voting advice at all. During the first Trump Administration and for most of the Biden Administration, the SEC defended its authority before the U.S. District Court for the District of Columbia—and the NAM joined the Commission in that fight as an intervenor-defendant. But after a district court judge ruled in ISS's favor in 2024, the Gensler SEC abandoned its defense of the Commission's regulatory authority.[19]

If ISS's case is successful, it will effectively block any future attempt to regulate proxy advisory firms via the proxy solicitation rules, by any Administration. That is why the NAM, as intervenor, has appealed the District Court ruling to the U.S. Court of Appeals for the District of Columbia Circuit—and we remain committed to defending the SEC's ability to provide commonsense oversight of these powerful actors. In fact, oral argument is scheduled in *ISS v. SEC*—which is now effectively ISS v. NAM—for this coming Friday, May 2.

III. The NAM supports Congress's important work to protect manufacturers and manufacturing workers by reining in proxy firms' outsized influence.

The 119th Congress, as well as the SEC under the leadership of recently confirmed Chairman Paul Atkins, have the opportunity to achieve concrete, commonsense reforms that right-size the role that proxy advisory firms play in America's capital markets. The stakes could not be higher for manufacturers: after years of the SEC politicizing the proxy process and empowering proxy firms, policymakers now can—and must—take steps to limit proxy firms' outsized influence, ensure accurate and reliable information for investors, empower manufacturers to make corporate governance decisions that enhance growth, job creation, and shareholder value, and protect Main Street investors. To that end, manufacturers strongly support reforms that:

- Underscore the SEC's existing statutory authority to regulate these powerful market actors;
- Prevent conflicts of interest from clouding proxy firm recommendations, and provide increased transparency with respect to those conflicts;
- Allow companies to review draft proxy firm recommendations in order to identify errors or misrepresentations;
- Ensure investors are aware of company responses to adverse proxy firm recommendations;
- Guarantee that proxy firms remain subject to antifraud liability; and
- Limit robo-voting that disenfranchises investors and undermines investment advisers' fiduciary duty.

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[17] NAM Comments on File No. S7-17-21 (24 December 2021). *Available at* https://documents.nam.org/tax/nam_proxy_comments_2021.pdf.

[18] *Nat'l Ass'n of Mfrs. v. SEC*, 105 F.4th 802 (2024).

[19] *Institutional S'holder Servs. Inc. v. SEC*, No. 24-5105 (consolidated with 24-5112) (D.C. Cir.), Mot. to Voluntarily Dismiss Appeal.

SEC Authority to Regulate Proxy Voting Advice

As noted, oral argument in ISS's case to strip the SEC of its authority to regulate proxy voting advice will take place just a few days after today's hearing. In brief, the SEC's authority to regulate proxy advisory firms hinges on whether providing proxy voting advice constitutes a "solicitation" under the Securities Exchange Act of 1934.[20] Undoubtedly, it does. ISS has admitted as much, going as far back as a 1991 letter to the SEC explaining how the firm's recommendations were subject to the Commission's proxy solicitation rules, and seeking amendments to and exemptions from those rules to better fit its business model.[21]

Not only does the Exchange Act give the SEC the *authority* to regulate proxy firms, it provides a congressional *mandate* that the agency do so. As the Commission put it in its proposed proxy firm rule in 2019, "an overarching purpose of Section 14(a) [of the Exchange Act] is to ensure that communications to shareholders about their proxy voting decisions contain materially complete and accurate information. It would be inconsistent with that goal if persons whose business is to offer and sell voting advice broadly to large numbers of shareholders, with the expectation that their advice will factor into shareholders' voting decisions, were beyond the reach of Section 14(a)."[22] Indeed, it has long been clear that "the federal proxy rules apply to any person seeking to influence the voting of proxies by shareholders"—including proxy advisory firms.[23]

This foundational truth underpins the SEC's work in recent decades to establish an appropriate regulatory regime for proxy voting advice[24]—which is why the NAM will continue to offer a robust defense of the SEC's authority in court. Congress can play a role in that defense by continuing to make clear that proxy firms' provision of proxy voting advice *is* solicitation under Exchange Act Section 14(a). Such a clarification should not be necessary: as the NAM will argue before the D.C. Circuit on Friday, the text of the Exchange Act, contemporaneous dictionary definitions of the word "solicitation," the congressional intent of the 73rd Congress, and decades of practice by the SEC and other market actors (including proxy firms) should be sufficient to put the question to rest. But ISS's self-serving reinterpretation of unambiguous statutory text presents an opportunity for Congress to assert its own authority—which it exercised, via the Exchange Act, by directing the SEC to regulate shareholder communications such as proxy voting advice. Reminding the federal courts and the proxy firms of that fact can only serve to help preserve the 2020 rule and clear a path for a future SEC to work productively to rein in these unregulated actors.

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[20] *See* 15 U.S.C. Sec. 78n(a)(1) ("It shall be unlawful for any person…in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy…").

[21] Letter from Nell Minnow, President, ISS to Jonathan G. Katz, Secretary, SEC (1 August 1991). *Available at* https://documents.nam.org/TAX/Letter-from-ISS-to-SEC-re-Exchange-Act-Release-No.-29315.pdf.

[22] 2019 Proposed Rule, *supra* note 10, at 66523.

[23] *Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, 84 Fed. Reg. 47416 (10 September 2019). Release No. 34-86721; *available at* https://www.govinfo.gov/content/pkg/FR-2019-09-10/pdf/2019-18355.pdf.

[24] *See, e.g., Concept Release on the U.S. Proxy System*, 75 Fed. Reg. 42982 (22 July 2010). Release Nos. 34-62495, IA-3052, IC-29340; *available at* https://www.govinfo.gov/content/pkg/FR-2010-07-22/pdf/2010-17615.pdf ("As a general matter, the furnishing of proxy voting advice constitutes a 'solicitation' subject to the information and filing requirements in the proxy rules."); *see also* 2019 Proxy Advice Guidance, *supra* note 23 ("[P]roxy voting advice provided by a proxy advisory firm [generally] constitute[s] a solicitation under the federal proxy rules.").

Legislative Proposals to Rein in Proxy Firms

In addition to protecting the SEC's statutory authority, more must be done to provide appropriate regulatory oversight of proxy firms. Manufacturers commend members of the Financial Services Committee for their work on legislation to require proxy firms to register with the SEC, ensure they remain subject to antifraud liability, prevent asset managers from undermining their fiduciary duties by over-relying on the firms, limit robo-voting, prohibit conflicts of interest based on corporate consulting services, and require the SEC to study the firms' influence on the market.

Proxy Firm Registration (Rep. Steil)

The NAM supports draft legislation, sponsored by Rep. Bryan Steil (R-WI), that would require proxy firms to register with the SEC. As a condition of registration, proxy firms would be required to:

- Provide companies with the data and information underpinning their recommendations, and grant companies an opportunity to share feedback to correct errors and misrepresentations;
- Employ an ombudsman charged with engaging with companies and resolving issues identified by impacted businesses;
- Include any company statements responding to the firm's recommendations in its final report to clients;
- Certify that the firm has sufficient staff and resources to provide voting advice based on accurate information and in the economic best interests of shareholders;
- Provide disclosures on the firm's procedures, methodologies, organizational structure, professional qualifications, and code of ethics; and
- Adopt policies to identify, disclose, and manage any conflicts of interest.

Additionally, proxy firms would be prohibited from providing advisory or consulting services that present a conflict of interest with respect to their proxy vote recommendations.

These reforms will improve the quality, accuracy, and reliability of proxy voting advice, and they are essential to countering the threat that proxy firms' outsized influence poses to everyday Americans' retirement savings. The NAM applauds Rep. Steil for his years of leadership on this critical issue, and manufacturers strongly support his draft legislation to bring appropriate oversight to the proxy advice industry.

Proxy Firm Antifraud Liability (Rep. Steil)

The 2020 proxy firm rule clarified that proxy voting advice constitutes a solicitation under the Exchange Act—and, in so doing, clarified that proxy firms are subject to the proxy solicitation rules, including those rules' antifraud standards. Specifically, the 2020 rule noted that proxy firms may need to provide appropriate disclosures with respect to their methodologies, sources of information, and conflicts of interest in order to ensure that their advice is not false or misleading.

In rescinding much of the 2020 rule, the SEC in 2022 removed the language that had been added to the antifraud standards about proxy firms' methodologies, sources of information, and conflicts of interest. While proxy firms are still subject to antifraud liability under the rescission (a standard that would fall if ISS's lawsuit is successful), the standards under which that liability may apply have been significantly weakened.

The NAM supports draft legislation, sponsored by Rep. Steil, that would clarify that the failure to disclose material information associated with proxy voting advice, such as information about a proxy firm's methodologies, sources of information, and conflicts of interest, would render the advice false or misleading. This clarification is critical to ensuring that proxy firm clients have access to the material information they need to make fully informed voting decisions.

Asset Manager Reliance on Proxy Firm Recommendations (Rep. Loudermilk)

Despite their fiduciary duty to Main Street investors and retirees, some asset managers are over-relying on the ratings and recommendations of proxy firms and may be making proxy voting decisions based on criteria divorced from shareholders' financial best interests.

The NAM supports draft legislation, sponsored by Rep. Barry Loudermilk (R-GA), that would require investment advisers, asset managers, and pension funds relying on the services of a proxy firm to explain how the firm's recommendations impacted their proxy votes, analyze their voting decisions based on investors' economic best interests and the institution's fiduciary duty, and disclose the degree to which the institution voted in line with the firm's recommendations. These institutions would also be required to certify that their voting decisions were made based solely on the economic best interests of their customers and beneficiaries. For larger institutions, the bill would also require them to disclose the economic analysis underpinning any voting decisions that diverged from the recommendation of a company's board of directors.

These safeguards would ensure that the institutions charged with protecting Main Street investors' retirement security are acting in those investors' best interests. They would also give everyday Americans the information they need to make decisions about how their investments are managed.

Robo-Voting (Rep. Nunn)

Robo-voting enhances proxy firms' power and influence by enabling them to automatically cast investors' proxy votes in line with the firm's preferred policies. It also has the potential to significantly undermine institutional investors' fiduciary duty to their Main Street investor clients.

The NAM supports draft legislation, sponsored by Rep. Zach Nunn (R-IA), that would prevent institutional investors from outsourcing proxy voting decisions to proxy advisory firms via the firms' robo-voting services. It would also direct the SEC to promulgate a new rule limiting robo-voting. These reforms would ensure that asset managers actually review the information available to them before casting proxy votes that could impact the direction of a business and the performance of everyday Americans' investments.

Proxy Firm Conflicts of Interest (Rep. Fitzgerald)

Conflicts of interest remain the clearest threat to Main Street investors posed by the proxy firms. In particular, ISS's business consulting service benefits directly from negative recommendations made by the firm's proxy voting service—incentivizing recommendations that drive businesses to purchase consulting services rather than ones that drive shareholder value creation. The NAM has long supported efforts to prohibit, or at a minimum require disclosure of, proxy firm conflicts of interest in order to protect companies from the firms and to enhance transparency and objectivity for investors.

The NAM supports the Stopping Proxy Advisor Racketeering Act, sponsored by Rep. Scott Fitzgerald (R-WI), which would prevent proxy firms from offering proxy voting advice that is poisoned by a conflict of interest resulting from their consulting services. This prohibition would ensure that the proxy voting advice on which investors rely remains objective, and that companies are no longer forced to pay for consulting services in order to avoid the costs of overcoming negative proxy firm recommendations.

Corporate Governance Examination (Rep. Wagner)

The politicization of the proxy process and the outsized influence of proxy firms impact companies of all sizes, including small businesses. Smaller companies in particular often lack the resources to

combat activists and proxy firms—and companies of all sizes face pressure to comply with the policy preferences of these powerful actors rather than court controversy and divert capital by engaging in costly proxy fights.

The NAM supports draft legislation, sponsored by Chair Wagner, that would require the SEC to conduct a comprehensive study on the proxy process. The study would examine the role of proxy firms, analyze the effectiveness of the SEC's Rule 14a-8, and illustrate the costs of politically motivated shareholder proposals. This is critical information necessary for Congress and the SEC to fully understand what changes are necessary to protect companies of all sizes from costs and distractions of a politicized proxy process.

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Publicly traded manufacturers are committed to growing their businesses, creating value for shareholders, and driving economic expansion, but manufacturers still must contend with proxy advisory firms that have divergent agendas and little interest in their success. This remains the case despite the fact that the SEC finalized its landmark proxy firm rule nearly five years ago—a rule that has never been allowed to take effect.

Congress and the SEC now have the opportunity to preserve and improve upon that rule, including by affirming the SEC's authority to regulate proxy voting advice. Manufacturers are depending on Congress to pass laws—and the SEC to finalize regulations—that increase transparency, ensure accuracy, reduce conflicts of interest, limit robo-voting, and rein in proxy firms' control over public company governance and the security of millions of Main Street investors' life savings.

The NAM stands ready to work with Congress to ensure that manufacturers can escape the outsized influence of proxy firms and instead focus on creating jobs, contributing to their communities, powering the American economy, and investing for the future.