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The Honorable Ann Wagner
Chairwoman
Subcommittee on Capital Markets
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Brad Sherman
Ranking Member
Subcommittee on Capital Markets
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairwoman Wagner and Ranking Member Sherman,

On behalf of the National Association of Manufacturers, I write to thank you for holding today's Subcommittee on Capital Markets hearing to provide oversight of the Securities and Exchange Commission's Division of Corporation Finance. Congressional oversight of the Division, which has jurisdiction over much of the agency's current regulatory onslaught, is critical to ensuring that the SEC operates within its statutory authority and remains responsive to the American people.

The NAM is the largest manufacturing association in the United States, representing manufacturers in every industrial sector and in all 50 states, as well as the 13 million people who make things in America. Manufacturing is a capital-intensive industry, requiring significant investments for equipment purchases, job creation and research and development.

Manufacturers often turn to the public market to finance these pro-growth activities, which set the stage for economic expansion, innovation and job creation. A key pillar of the SEC's tripartite mission is to facilitate this important capital formation. Unfortunately, over the last two years the Division of Corporation Finance has instead advanced a policy agenda that will impose costly regulatory burdens on manufacturers and hamper long-term value creation for shareholders.

The NAM respectfully submits for the Subcommittee's consideration several recent Division actions that could threaten access to capital and impose costly and unnecessary regulatory burdens on manufacturers—ultimately slowing job creation and hampering American competitiveness.

I. The Division is attempting to impose costly and unworkable climate disclosure requirements on public and private companies.

In March 2022, the Division proposed a novel, one-size-fits-all climate reporting mandate that would impose tremendous costs on all public companies, as well as on the private businesses within their supply chains.[1] Manufacturers are dedicated to combatting climate change and to providing appropriate disclosures about these efforts, but the SEC's proposed rule would require reporting far in excess of the material information necessary for investors to make informed decisions. In response to the proposed rule, the NAM expressed concern that it would "institute[ ] a wide-ranging mandate for public companies to generate and report pages upon pages of information, much of which is not material to their operations or financial performance," ultimately resulting in

[1] *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334 (11 April 2022). Release Nos. 33-11042, 33-94478; *available at* https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf.

"substantially increase[d] compliance costs and legal risks for public companies—despite limited investor benefit."[2]

If finalized as proposed, the rule would impose a wide range of unworkable mandates on manufacturers of all sizes. For example, the proposed rule would require disclosure of so-called "Scope 3" emissions, forcing public companies to report emissions data from their suppliers and customers. Mandatory Scope 3 reporting would represent a costly, uncertain and ultimately infeasible standard for public issuers as well as the small and privately held businesses within their supply chains. Additionally, the proposed rule would require companies to create novel and costly processes to incorporate climate reporting into their consolidated financial statements. Moreover, most of the rule's requirements would take effect either immediately or soon after the promulgation of a final rule, with little-to-no flexibility for companies, including small businesses, to adjust to such an immense compliance burden.

This focus on costly and immaterial disclosure mandates is a departure from the Division's stance as recently as 2016, when it said that "disclosure relating to environmental and other matters of social concern should not be required of all registrants unless appropriate to further a specific congressional mandate or unless, under the particular facts and circumstances, such matters are material."[3]

If the SEC wants to move forward with a climate disclosures rule, it must develop a proposal that is focused solely on material information for investors—and thus more tailored, workable and cost-effective for manufacturers. The NAM respectfully encourages the Subcommittee to utilize its oversight authority to urge the Division to:

- Focus any climate-related disclosure requirements solely on material information;
- Abandon its attempt to mandate reporting of Scope 3 emissions;
- Rescind the proposed rule's "financial statement metrics" requirements;
- Delay the effective date of any final rule and, once it becomes effective, allow companies to make annual reports later in the year than proposed;
- Exempt small and newly public companies from the proposed rule and protect private businesses from reporting burdens; and
- Take steps to increase liability protections and reduce the costs of compliance.

II. The Division has rescinded critical reforms to the rules governing proxy advisory firms.

Under then-Chairman Jay Clayton, the SEC finalized in 2020 a long-awaited rule to provide appropriate oversight of proxy advisory firms.[4] The two leading proxy firms, ISS and Glass Lewis, maintain a duopoly over the proxy voting advice market. As such, these firms exercise outsized influence over public companies and their shareholders—despite their inflexible policies, lack of transparency, significant conflicts of interest, propensity for errors and recommendations that often prioritize agendas unrelated to long-term shareholder value creation. The 2020 rule, developed over the course of a decade, instituted commonsense safeguards designed to increase transparency into these powerful actors. Critically, the rule required proxy firms to provide their final recommendations to impacted companies and notify investors of any company responses to those recommendations.

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[2] NAM Comments on File No. S7-10-22 (6 June 2022). *Available at* https://documents.nam.org/tax/nam_comments_sec_climate_rule.pdf.

[3] *Business and Financial Disclosure Required by Regulation S-K*, 81 Fed. Reg. 23916 (22 April 2016). Release Nos. 33-10064, 34-77599; *available at* https://www.govinfo.gov/content/pkg/FR-2016-04-22/pdf/2016-09056.pdf.

[4] *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.

In 2021, the SEC began to take steps to dismantle this important progress. In a series of coordinated actions in June 2021, Chairman Gary Gensler announced that the SEC would "revisit" the 2020 rule,[5] the Division suspended enforcement of the rule[6] and the SEC granted ISS "relief" from the rule's requirements via a court filing.[7] In a lawsuit brought by the NAM, a federal judge found that this suspension of the rule, which was effectuated absent the notice-and-comment proceedings required by the Administrative Procedure Act, was unlawful.[8]

In November 2021, the Division proposed a rule to rescind critical provisions 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.[9] The rescission, which manufacturers strongly opposed,[10] was finalized in July 2022.[11] In addition to rescinding the 2020 rule, the SEC also rescinded the associated robo-voting guidance,[12] which cautioned asset managers against outsourcing their voting authority to the firms.

Manufacturers support maintaining the commonsense protections adopted in 2020 and further enhancing SEC oversight of proxy advisory firms. The NAM respectfully encourages the Subcommittee to utilize its oversight authority to urge the Division to:

- Abandon its attempts to set aside the 2020 rule;
- Vigorously enforce the 2020 rule, including its issuer engagement and anti-fraud provisions; and
- Propose a new rule that strengthens the reforms adopted in 2020, including by instituting a requirement that proxy firms allow companies to provide feedback on draft recommendations (as was proposed by the SEC in 2019).

III. The Division has empowered activists pursuing ESG agendas.

Over the past two years, the Division has taken several steps to encourage and empower activists seeking to hijack public company proxy ballots in pursuit of agendas divorced from long-term value creation. In November 2021, the Division issued Staff Legal Bulletin 14L, which effectively prohibits companies from excluding from the proxy ballot any shareholder proposal related to environmental,

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[5] *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.

[6] *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.

[7] *See* Mtn. for Abeyance, *Institutional Shareholder Services Inc. v. SEC*, No. 19-cv-3275 (D.D.C.). The NAM is an intervenor-defendant in this case.

[8] *See Nat'l Ass'n of Mfrs. v. SEC*, 2022 WL 16727731 (W.D. Tex. 2022).

[9] *Proxy Voting Advice*, 86 Fed. Reg. 67383 (26 November 2021). Release No. 34-93595; *available at* https://www.govinfo.gov/content/pkg/FR-2021-11-26/pdf/2021-25420.pdf.

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

[11] *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. The NAM's lawsuit showing that the rescission violated the SEC's obligation to avoid arbitrary and capricious rulemaking is currently pending before the Fifth Circuit Court of Appeals. *See Nat'l Ass'n of Mfrs. v. SEC,* No. 7:22-cv-163-DC (5th Cir.).

[12] *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.

social and governance topics of "broad societal impact," irrespective of the proposal's relevance to the business or its long-term value.[13] The NAM said that SLB 14L would "accelerate the trend of politically motivated shareholder proposals and hamstring companies seeking to focus the proxy ballot on issues critical to business growth and investor returns."[14]

Then, in July 2022, the Division proposed a rule to narrow the criteria under Rule 14a-8 by which companies can exclude activist shareholder proposals from the proxy ballot.[15] These criteria were designed to limit proposals that have already been substantially implemented by the company, are duplicative of other proposals on a given year's proxy ballot or have been rejected by a large percentage of the shareholder base in previous years. The Division's proposal would make it more difficult for issuers to utilize these exclusions, effectively creating a roadmap for activists to ensure that their preferred proposals are always included on the ballot. In response to the proposed rule, the NAM said that it would "make it easier for activists to flood the proxy ballot."[16]

The NAM is concerned that the Division continues to prioritize the agendas of activist shareholders over those of public companies and their long-term shareholders. The NAM respectfully encourages the Subcommittee to utilize its oversight authority to urge the Division to:

- Rescind SLB 14L;
- Abandon its proposed rule to narrow the Rule 14a-8 exclusion criteria; and
- Maintain and enforce the amendments to Rule 14a-8 adopted in 2020[17] that increased the submission and resubmission thresholds for activist shareholder proposals.

IV. The Division is hampering companies' ability to respond to cybersecurity incidents.

In March 2022, the Division proposed a rule to require new cybersecurity disclosures from publicly traded companies.[18] Most notably, the proposed rule includes a requirement that companies disclose cybersecurity incidents to the public within four days. This rigid mandate grants businesses no flexibility to delay or forgo disclosure in order to investigate and respond to an incident, work with law enforcement or avoid tipping off attackers. The NAM said that the proposed four-day reporting requirement "would increase costs and complexity for businesses, potentially mislead investors, and ultimately create significant risks for shareholders and the broader economy that would eclipse the potential benefits of reporting."[19]

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[13] *Staff Legal Bulletin No. 14L*. SEC Division of Corporation Finance (3 November 2021). *Available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14lshareholder-proposals.

[14] NAM Comments on Staff Legal Bulletin No. 14L (30 November 2021). *Available at* https://documents.nam.org/tax/nam_comments_slb_14l.pdf.

[15] *Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8*, 87 Fed. Reg. 45052 (27 July 2022). Release Nos. 34-95267, IC-34647; *available at* https://www.govinfo.gov/content/pkg/FR-2022-07-27/pdf/2022-15348.pdf.

[16] NAM Comments on File No. S7-20-22 (12 September 2022). *Available at* https://documents.nam.org/tax/nam_14a-8_comments.pdf.

[17] *Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8*, 85 Fed. Reg. 214 (4 November 2020). Release No. 34-89964; *available at* https://www.govinfo.gov/content/pkg/FR-2020-11-04/pdf/2020-21580.pdf.

[18] *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*, 87 Fed. Reg. 16590 (23 March 2022). Release Nos. 33-11038, 34-94382, IC-34529; *available at* https://www.govinfo.gov/content/pkg/FR-2022-03-23/pdf/2022-05480.pdf.

[19] NAM Comments on File No. S7-09-22 (9 May 2022). *Available at* https://documents.nam.org/tax/nam_comments_sec_cybersecurity_rule.pdf.

The NAM is concerned that the SEC's proposed approach to cybersecurity disclosures could endanger businesses, shareholders and national security. The NAM respectfully encourages the Subcommittee to utilize its oversight authority to urge the Division to:

- Amend its proposed cybersecurity disclosures rule to allow significant flexibility with respect to the timing of companies' cybersecurity incident reports;
- Allow companies to defer to law enforcement and take steps to protect public safety and national security;
- Limit any cybersecurity disclosure requirements to material information; and
- Defer to the Cybersecurity and Infrastructure Security Agency as it works to implement the cybersecurity incident disclosure requirements of the Cyber Incident Reporting for Critical Infrastructure Act of 2022.[20]

V. The Division is attempting to limit efficient capital allocation by discouraging stock buybacks.

In May 2023, the Division finalized a rule designed to discourage the common practice of stock buybacks by publicly traded companies.[21] Though couched as a new disclosure requirement, the rule's intent is clearly to deter companies from repurchasing shares even when economically efficient and appropriate for their business.

Publicly traded manufacturers must be able to attract shareholders and efficiently allocate shareholder capital—and corporate stock buybacks are important for both capital formation and capital allocation. These return-of-capital transactions allow excess capital to flow where it can most efficiently be used, creating value for shareholders and enabling companies throughout the economy to attract much-needed investment. The SEC's rule will impose new disclosure requirements on companies repurchasing shares of stock, which the NAM said would "impose significant cost and administrative burdens" and "expose sensitive, competitive information to the market, which can then be used against a company and its shareholders."[22]

The NAM opposes efforts to punish or limit stock buybacks, which are an economically efficient method of allocating capital and returning value to shareholders. The NAM respectfully encourages the Subcommittee to utilize its oversight authority to urge the Division to support companies' ability to utilize efficient capital allocation practices like stock buybacks, which benefit issuers and investors alike.

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[20] *See* Division Y, *Consolidated Appropriations Act, 2022*. P.L. 117-103.

[21] *Share Repurchase Disclosure Modernization*, 88 Fed. Reg. 36002 (1 June 2023). Release Nos. 34-97424, IC-34906; *available at* https://www.govinfo.gov/content/pkg/FR-2022-02-15/pdf/2022-01068.pdf.

[22] NAM Comments on File No. S7-21-21 (1 April 2022). *Available at* https://documents.nam.org/tax/nam_buybacks_comments.pdf.

VI. The Division may soon propose prescriptive human capital management and corporate board diversity disclosure rules.

According to the SEC's regulatory agenda, the Division will soon propose rules to "enhance registrant disclosure regarding human capital management"[23] and "enhance registrant disclosures about the diversity of board members and nominees."[24]

Manufacturers are leaders in enhancing diversity and inclusion in the workforce, but the NAM is concerned that the SEC may propose prescriptive, immaterial disclosure mandates related to human capital and board diversity that would align with the Commission's approach to other ESG topics. Inflexible mandates to disclose immaterial information would represent a departure from the Commission's 2020 amendments to Regulation S-K, which added a principles-based requirement that enabled public companies to describe, to the extent material, "any human capital measures or objectives that the registrant focuses on in managing the business."[25]

It is not clear that additional prescriptive disclosures are needed beyond what is already required by the 2020 amendments to Regulation S-K, and the NAM is concerned that the SEC will impose costly and unworkable requirements on public companies. The NAM respectfully encourages the Subcommittee to utilize its oversight authority to urge the Division to ensure that any new disclosure requirements focus solely on material information.

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Manufacturers strongly support the Subcommittee's efforts to provide appropriate oversight of the Division of Corporation Finance. The NAM looks forward to working with Congress to ensure that any rules finalized by the SEC are workable for manufacturers and support the capital formation necessary for the industry to continue to create jobs, drive economic expansion and support American competitiveness.

Sincerely,

Charles Crain
Senior Director, Tax and Domestic Economic Policy

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[23] *RIN 3235-AM88: Human Capital Management Disclosure*. *Spring 2023 Unified Agenda of Regulatory and Deregulatory Actions*, Office of Information and Regulatory Affairs. *Available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=3235-AM88.

[24] *RIN 3235-AL91: Corporate Board Diversity. Spring 2023 Unified Agenda of Regulatory and Deregulatory Actions*, Office of Information and Regulatory Affairs. *Available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=3235-AL91.

[25] *Modernization of Regulation S-K Items 101, 103, and 105*, 85 Fed. Reg. 63726 (8 October 2020). Release Nos. 33-10825, 34-89670; *available at* https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-19182.pdf.