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Managing Vice President,  
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April 18, 2023

The Honorable Patrick McHenry  
Chairman  
Committee on Financial Services  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Maxine Waters  
Ranking Member  
Committee on Financial Services  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman McHenry and Ranking Member Waters:

The National Association of Manufacturers (“NAM”) appreciates that the House Financial Services Committee is holding today’s hearing to provide oversight of the Securities and Exchange Commission (“SEC”) given the impact that the Commission’s aggressive rulemaking agenda is already having on both publicly traded and privately held manufacturing businesses. Robust congressional oversight of federal agencies is critical to ensuring that regulators remain within their statutory authority and that agency leadership is 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 millions of women and men who make things in America. Manufacturing is a capital-intensive industry, requiring significant investments for equipment purchases, R&D, and job creation. Access to capital throughout a company’s life cycle allows for investment in new product lines, expansion of production capabilities, growth of operations, increased R&D spending, and enhanced hiring and worker benefits.

Manufacturers often turn to the capital markets 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 SEC has instead advanced an ambitious policy agenda that will impose costly regulatory burdens on manufacturers and hamper long-term value creation for shareholders.

The NAM respectfully submits for the Committee’s consideration several recent SEC actions that could threaten access to capital and impose costly and unnecessary regulatory burdens on manufacturers that slow job creation and growth.

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

In March 2022, the SEC 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.<sup>1</sup> While manufacturers are dedicated to combatting climate change and to providing appropriate disclosures about these efforts, 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

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<sup>1</sup> *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>.

material to their operations or financial performance,” ultimately resulting in “substantially increase[d] compliance costs and legal risks for public companies—despite limited investor benefit.”<sup>2</sup>

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.

Put simply, if it wants to move forward with a climate disclosures rule, the SEC must develop a proposal that is more tailored, workable, and cost-effective for manufacturers. The NAM respectfully encourages the Committee to utilize its oversight authority to urge the SEC 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 SEC 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.<sup>3</sup> The two leading proxy firms, ISS and Glass Lewis, maintain a virtual duopoly over the proxy voting advice market. As such, these firms exercise outsized influence over public companies and their shareholders—despite their one-size-fits-all 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.

In 2021, the SEC began to take steps to dismantle this important progress. In a series of actions in June 2021, the SEC announced it would “revisit” the 2020 rule<sup>4</sup> and suspend enforcement of the rule;<sup>5</sup> the SEC also made clear to ISS in a court filing that the decision to suspend enforcement

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<sup>2</sup> NAM Comments on File No. S7-10-22 (6 June 2022). Available at [https://documents.nam.org/tax/nam\\_comments\\_sec\\_climate\\_rule.pdf](https://documents.nam.org/tax/nam_comments_sec_climate_rule.pdf).

<sup>3</sup> *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>.

<sup>4</sup> *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>.

<sup>5</sup> *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>.

granted proxy firms “relief” from the rule’s compliance requirements.<sup>6</sup> 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.<sup>7</sup>

In November 2021, the SEC 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.<sup>8</sup> The rescission, which manufacturers strongly opposed,<sup>9</sup> was finalized in July 2022.<sup>10</sup>

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

- Abandon its attempts to set aside the 2020 rule;
- Vigorously enforce the 2020 rule, including its issuer engagement and anti-fraud provisions;
- 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); and
- Clarify that proxy ratings agencies, like proxy advisory firms, are subject to SEC oversight via the proxy solicitation rules.

### **III. The SEC intends to require public financial disclosures from private businesses.**

In 2020, the SEC adopted amendments to Rule 15c2-11 to require certain public disclosures from issuers of over-the-counter equity securities.<sup>11</sup> In September 2021, the SEC’s Division of Trading and Markets issued a no-action letter expanding the application of Rule 15c2-11 (and the 2020 amendments thereto) to include fixed-income securities.<sup>12</sup> This reinterpretation of Rule 15c2-11, adopted without any opportunity for public comment, directly impacts issuers of fixed-income securities such as corporate bonds issued pursuant to Rule 144A. Subsequent no-action letters in December 2021 and November 2022 have reaffirmed this novel and damaging interpretation.<sup>13</sup>

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<sup>6</sup> 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.

<sup>7</sup> See *Nat’l Ass’n of Mfrs. v. SEC*, 2022 WL 16727731 (W.D. Tex. 2022).

<sup>8</sup> *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>.

<sup>9</sup> NAM Comments on File No. S7-17-21 (24 December 2021). Available at [https://documents.nam.org/tax/nam\\_proxy\\_comments\\_2021.pdf](https://documents.nam.org/tax/nam_proxy_comments_2021.pdf).

<sup>10</sup> 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 (5<sup>th</sup> Cir.).

<sup>11</sup> *Publication or Submission of Quotations Without Specified Information*, 85 Fed. Reg. 68124 (27 October 2020). Release Nos. 33-10842, 34-89891; available at <https://www.govinfo.gov/content/pkg/FR-2020-10-27/pdf/2020-20980.pdf>.

<sup>12</sup> Letter from Josephine Tao, Assistant Director, Office of Trading Practices, Division of Trading and Markets, SEC to Racquel Russell, Senior Vice President and Director of Capital Markets Policy, Office of the General Counsel, FINRA (24 September 2021). Available at <https://www.sec.gov/files/rule-15c2-11-fixed-income-securities-092421.pdf>.

<sup>13</sup> See Letter from Josephine Tao, Assistant Director, Office of Trading Practices, Division of Trading and Markets, SEC to Racquel Russell, Senior Vice President and Director of Capital Markets Policy, Office of the General Counsel, FINRA (16 December 2021), available at <https://www.sec.gov/files/fixed-income-rule-15c2-11-nal-finra-121621.pdf>; see also Letter from Josephine Tao, Assistant Director, Office of Trading Practices, Division of Trading and Markets, SEC to Racquel Russell, Senior Vice President and Director of Capital Markets Policy, Office of the General Counsel, FINRA (30 November 2022), available at <https://www.sec.gov/files/fixed-income-rule-15c2-11-nal-finra-113022.pdf>.

Many privately held manufacturers issue Rule 144A debt to raise capital. Applying Rule 15c2-11 to Rule 144A offerings will require these *private* issuers to make detailed financial information about their business *publicly available*. Rule 144A already requires issuers to make their financial information available to institutional investors on a confidential basis, and these sophisticated institutions are the only investors allowed to participate in the Rule 144A market. The SEC's new interpretation of Rule 15c2-11 would expose competitively sensitive information to the public, which cannot even purchase Rule 144A securities. Moreover, this drastic policy change was effectuated without public notice-and-comment or any cost-benefit analysis.

Recent economic analysis shows that this novel interpretation of Rule 15c2-11 will significantly reduce liquidity for Rule 144A issuers and result in a corresponding increase in their cost of capital.<sup>14</sup> The impacts to privately held Rule 144A issuers will be felt across the economy, resulting in 30,000 lost jobs each year over five years, 50,000 lost jobs each year over the next five years, and 100,000 lost jobs each year thereafter.<sup>15</sup>

The no-action relief for Rule 144A securities expires on January 4, 2025; accordingly, it is critical that policymakers act soon to protect privately held businesses and safeguard their ability to raise job-creating capital.<sup>16</sup> The NAM respectfully encourages the Committee to utilize its oversight authority to urge the SEC to:

- Rescind the September 2021, December 2021, and November 2022 no-action letters applying Rule 15c2-11 to fixed-income securities, including to Rule 144A fixed-income securities;
- Expressly clarify that Rule 144A fixed-income securities are exempt from Rule 15c2-11, either by promulgating amendments to Rule 15c2-11 or by exercising the Commission's exemptive authority under Rule 15c2-11(g); and
- Provide emergency interim relief for Rule 144A fixed-income securities while the Commission pursues a permanent exemption.

#### **IV. The SEC has empowered shareholder activists pursuing ESG agendas.**

Over the last two years, the SEC has taken several steps to encourage and empower shareholder activists seeking to hijack public company proxy ballots in pursuit of agendas divorced from long-term value creation. In November 2021, the Division of Corporation Finance issued Staff Legal Bulletin ("SLB") 14L, which effectively prohibits companies from excluding from the proxy ballot any shareholder proposal related to environmental, social, and governance ("ESG") topics of "broad societal impact," irrespective of the proposal's relevance to the business or its long-term value.<sup>17</sup> The NAM said that SLB 14L would "accelerate the trend of politically motivated shareholder proposals

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<sup>14</sup> *Macroeconomic impacts of applying Rule 15c2-11 to Rule 144A debt issued by private US companies*. EY (November 2022). Available at <https://documents.nam.org/tax/ey-nam-144a-study.pdf>.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> The NAM and the Kentucky Association of Manufacturers have filed a petition with the SEC seeking emergency interim relief from the new interpretation, as well as a petition for rulemaking and exemptive relief to reverse the staff determination. See NAM, KAM Petition for Emergency Interim Relief and Emergency Request for a Stay Pending Commission Action or Judicial Review With Respect to Application of Rule 15c2-11 to Rule 144A Securities (22 November 2022), available at [https://documents.nam.org/law/nam\\_kam\\_144a\\_interim\\_relief\\_petition.pdf](https://documents.nam.org/law/nam_kam_144a_interim_relief_petition.pdf); see also NAM, KAM Petition for Rulemaking and Application for Exemption With Respect to Rule 15c2-11 (22 November 2022), available at [https://documents.nam.org/law/nam\\_kam\\_144a\\_permanent\\_relief\\_petition.pdf](https://documents.nam.org/law/nam_kam_144a_permanent_relief_petition.pdf).

<sup>17</sup> *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>.

and hamstringing companies seeking to focus the proxy ballot on issues critical to business growth and investor returns.”<sup>18</sup>

Then, in July 2022, the SEC proposed a rule to narrow the criteria under Rule 14a-8 by which companies can exclude activist shareholder proposals from the proxy ballot.<sup>19</sup> 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 SEC’s proposal would make it more difficult for issuers to utilize these exclusions. In response, the NAM said that the proposed rule would “make it easier for activists to flood the proxy ballot.”<sup>20</sup>

The NAM is concerned that the SEC continues to prioritize the agendas of activist shareholders over those of public companies and their long-term shareholders. The NAM respectfully encourages the Committee to utilize its oversight authority to urge the SEC 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<sup>21</sup> that increased the submission and resubmission thresholds for activist shareholder proposals.

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

In December 2021, the SEC proposed a rule designed to discourage the common practice of stock buybacks by publicly traded companies.<sup>22</sup> Though couched as a new disclosure requirement, the rule’s intent was clearly to deter companies from repurchasing shares even when economically efficient and appropriate for their business.

It is critical to their success as publicly traded companies that manufacturers are 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 proposed rule would impose a *daily* disclosure requirement for 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.”<sup>23</sup>

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<sup>18</sup> NAM Comments on Staff Legal Bulletin No. 14L (30 November 2021). Available at [https://documents.nam.org/tax/nam\\_comments\\_slb\\_14l.pdf](https://documents.nam.org/tax/nam_comments_slb_14l.pdf).

<sup>19</sup> *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>.

<sup>20</sup> NAM Comments on File No. S7-20-22 (12 September 2022). Available at [https://documents.nam.org/tax/nam\\_14a-8\\_comments.pdf](https://documents.nam.org/tax/nam_14a-8_comments.pdf).

<sup>21</sup> *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>.

<sup>22</sup> *Share Repurchase Disclosure Modernization*, 87 Fed. Reg. 8443 (15 February 2022). Release Nos. 34-93783, IC34440; available at <https://www.govinfo.gov/content/pkg/FR-2022-02-15/pdf/2022-01068.pdf>.

<sup>23</sup> NAM Comments on File No. S7-21-21 (1 April 2022). Available at [https://documents.nam.org/tax/nam\\_buybacks\\_comments.pdf](https://documents.nam.org/tax/nam_buybacks_comments.pdf).

The NAM opposes efforts to punish or limit stock buybacks, which are an economically efficient, legitimate method of allocating capital and returning value to shareholders. The NAM respectfully encourages the Committee to utilize its oversight authority to urge the SEC to:

- Abandon its proposed share repurchase disclosure rule;
- Avoid imposing undue burdens, including the proposed daily reporting requirement, on companies engaged in stock buybacks; and
- Support companies' ability to utilize efficient capital allocation practices like stock buybacks, which benefit issuers and investors alike.

#### **VI. The SEC is hampering companies' ability to respond to cybersecurity incidents.**

In March 2022, the SEC proposed a rule to require new cybersecurity disclosures from publicly traded companies.<sup>24</sup> 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."<sup>25</sup>

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 Committee to utilize its oversight authority to urge the SEC 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; 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.<sup>26</sup>

#### **VII. The SEC may soon propose prescriptive human capital management and corporate board diversity disclosure rules.**

According to the SEC's regulatory agenda, the Commission will soon propose rules to "enhance registrant disclosure regarding human capital management"<sup>27</sup> and "enhance registrant disclosures about the diversity of board members and nominees."<sup>28</sup>

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<sup>24</sup> *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>.

<sup>25</sup> NAM Comments on File No. S7-09-22 (9 May 2022). Available at [https://documents.nam.org/tax/nam\\_comments\\_sec\\_cybersecurity\\_rule.pdf](https://documents.nam.org/tax/nam_comments_sec_cybersecurity_rule.pdf).

<sup>26</sup> See Division Y, *Consolidated Appropriations Act, 2022*. P.L. 117-103.

<sup>27</sup> RIN 3235-AM88: *Human Capital Management Disclosure*. Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions, Office of Information and Regulatory Affairs. Available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=3235-AM88>.

<sup>28</sup> RIN 3235-AL91: *Corporate Board Diversity*. Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions, Office of Information and Regulatory Affairs. Available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=3235-AL91>.

Manufacturers are leaders in enhancing diversity and inclusion in the workforce, but indications are that the SEC plans to propose prescriptive disclosure mandates related to human capital and board diversity that would align with the Commission's approach to other ESG topics. Costly prescriptive mandates 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 (such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the development, attraction and retention of personnel)."<sup>29</sup>

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 Committee to utilize its oversight authority to urge the SEC to ensure that any new disclosure requirements focus solely on material information.

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Manufacturers strongly support the Committee's efforts to provide appropriate oversight of the SEC's aggressive rulemaking agenda. 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,

A handwritten signature in black ink, appearing to read "Chris Netram". The signature is fluid and cursive, with a long horizontal stroke at the end.

Chris Netram  
Managing Vice President, Tax and Domestic Economic Policy

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<sup>29</sup> *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>.