

Chris Netram

*Managing Vice President,
Policy*

July 27, 2023

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

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

Dear Chairman McHenry and Ranking Member Waters:

On behalf of the National Association of Manufacturers, I write in strong support of legislation being considered today by the Financial Services Committee that would rein in the Securities and Exchange Commission's regulatory overreach, keep activists out of the boardroom and protect Americans' investments in manufacturing growth.

Manufacturers often turn to the public market to finance investments in company growth, job creation and research and development. When manufacturers offer shares to the public, it allows everyday Americans to participate in the industry's success, and publicly traded companies have a fiduciary duty to act in these Main Street investors' financial best interests. But in recent years manufacturers have experienced an influx of third parties seeking to divert their focus away from long-term value creation for shareholders and toward an environmental, social and governance agenda with little if any nexus to a company's business.

Politically motivated activists and underregulated proxy advisory firms have been empowered by recent actions by the SEC. And the SEC has taken steps to advance an ESG agenda of its own via prescriptive and inflexible disclosure mandates.

Congressional action is needed to counter the increasing politicization of public company governance. To ensure that manufacturers can focus on creating value for shareholders and driving economic expansion in the United States, the NAM has called on Congress to:

1. Prevent activists from hijacking the proxy ballot in pursuit of agendas unrelated to long-term business growth and shareholder value creation;
2. Rein in proxy advisory firms and limit their outsized influence on corporate governance;
3. Reinforce asset managers' fiduciary duty to Main Street investors and retirees; and
4. Address the onslaught of ESG disclosure mandates by requiring public companies to report only that information which is material to their shareholders.

The NAM applauds the Committee for your attention to these critical issues during your July hearing series on ESG and the proxy process, and we appreciate that today's mark-up includes legislation to limit the influence that activists and proxy firms have on public company governance. Manufacturers support the following legislation, which would depoliticize the business decisions that impact the lives and life savings of millions of Americans.

I. The Protecting Americans' Retirement Savings from Politics Act

The NAM strongly supports the Protecting Americans' Retirement Savings from Politics Act (H.R. 4767), sponsored by Rep. Bryan Steil (R-WI).

The efforts of activist groups and proxy firms to distract manufacturers from long-term value creation have been enabled by a lack of appropriate regulatory oversight from the SEC. In fact, the SEC over the past two years has taken proactive steps to support and empower these third-party actors—rescinding much-needed guardrails, limiting companies' ability to exclude activist proposals from the proxy ballot and encouraging ESG agendas unrelated to business growth and shareholder returns.

For example, in 2021 the SEC issued Staff Legal Bulletin 14L, which effectively prohibits companies from excluding from the proxy ballot any shareholder proposal related to environmental and social topics of "broad societal impact," irrespective of whether the issue in question is relevant to a business's operations. Similarly, in 2022 the SEC proposed a rule that would significantly limit companies' ability to exclude activist 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 also has rescinded an important rule that had instituted commonsense safeguards designed to increase transparency into proxy firms. These powerful actors, whose recommendations can impact the direction of a business and thus Americans' retirement security, now operate with minimal accountability for their conflicts of interest, opaque methodologies, rigid and inflexible policies, propensity for errors and misleading statements and unwillingness to engage with publicly traded companies.

The Protecting Americans' Retirement Savings from Politics Act would take important steps to block activists, proxy firms and the SEC from politicizing the proxy process. Manufacturers encourage the Committee to support the following reforms, which would keep activists out of the boardroom, rein in proxy firms and enable companies and their shareholders to focus on issues that drive growth and long-term value creation.

Title I—Performance Over Politics

Under Rule 14a-8, failed shareholder proposals must be included on the following year's proxy ballot if they have achieved a certain level of shareholder support. Proposals receiving as little as 5% support—which is to say, those opposed by 95% of shareholders—are guaranteed a place on a subsequent year's ballot despite overwhelming opposition from the shareholder base. This empowers activists pursuing niche agendas and the proxy advisory firms whose support for these proposals virtually guarantees they will exceed the necessary threshold for resubmission.

The NAM supports H.R. 4641, sponsored by Rep. Scott Fitzgerald (R-WI). Included as Title I of the Protecting Americans' Retirement Savings from Politics Act, Rep. Fitzgerald's legislation would increase the resubmission thresholds to require a more substantial level of shareholder support before allowing a failed proposal back on the proxy ballot. Specifically, to qualify for resubmission, a proposal would have to achieve 10% support if voted on once, 20% support if voted on twice or 40% support if voted on three or more times. These reforms would prevent companies from being forced to include on the proxy ballot proposals that have been rejected by an overwhelming majority of shareholders.

Title II—No Expensive, Stifling Governance

In 2022, the SEC proposed a rule to narrow the exclusion criteria under Rule 14a-8. The SEC's proposed rule would make it more difficult for companies to exclude proposals that have already been substantially implemented, 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 NAM supports H.R. 4644, sponsored by Rep. Erin Houchin (R-IN). Included as Title II of the Protecting Americans' Retirement Savings from Politics Act, Rep. Houchin's legislation would block the SEC from finalizing its proposed rule. By preserving the existing exclusion criteria, the bill would make it more difficult for activists to flood the proxy ballot with substantially implemented, duplicative and resubmitted proposals.

Title III—Exclusion of Certain ESG Shareholder Proposals

The SEC lacks the statutory authority to force companies to include politically motivated shareholder proposals on their proxy ballots. But under SLB 14L the SEC has adopted the official policy that companies must always include proposals that raise issues of "broad societal impact," even if those issues have no relationship to their operations.

The NAM supports H.R. 4640, sponsored by Rep. Byron Donalds (R-FL). Included as Title III of the Protecting Americans' Retirement Savings from Politics Act, Rep. Donalds' legislation would clarify that companies can always exclude shareholder proposals that seek to advance environmental, social and political agendas unrelated to their business. This change would ensure that the proxy ballot remains focused on issues that are relevant to long-term growth and shareholder value creation.

Title IV—Exclusions Available Regardless of Significant Social Policy Issue

Issued in November 2021, SLB 14L rescinded the SEC's content-neutral guardrails that previously had enabled companies and investors to take a company-specific approach to evaluating the relevance and appropriateness of shareholder proposals submitted to company proxy ballots. In place of the rescinded standards, SLB 14L announced that the SEC would "no longer focus on determining the nexus between a policy issue and the company," instead requiring all proposals with a "broad societal impact" to be included on the proxy ballot whenever submitted.

The NAM supports H.R. 4657, sponsored by Rep. John Rose (R-TN). Included as Title IV of the Protecting Americans' Retirement Savings from Politics Act, Rep. Rose's legislation would revoke this damaging policy and allow companies to omit shareholder proposals based on the Rule 14a-8 exclusion criteria, irrespective of whether they relate to a significant social policy issue. SLB 14L has encouraged activists to submit and the SEC to endorse proposals wholly unrelated to long-term value creation, so this change would be a welcome return to a proxy process focused on business growth and investor value.

Title V—Corporate Governance Examination

The politicization of the proxy process impacts companies of all sizes, including small businesses. Growing companies often lack the resources to combat activist efforts. They may also be impacted when politically motivated proposals force larger businesses to commit to changes within their value chain that flow down to small and privately held suppliers and customers.

The NAM supports H.R. 4662, sponsored by Rep. Ann Wagner (R-MO). Included as Title V of the Protecting Americans' Retirement Savings from Politics Act, Rep. Wagner's legislation would require

the SEC to conduct a comprehensive study on the proxy process. The study would examine the impacts of Rule 14a-8, the role of proxy advisory firms and 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 costly and undue influence.

Title VI—Registration of Proxy Advisory Firms

Given the SEC's rescission of much of its 2020 proxy firm rule, more must be done to provide appropriate regulatory oversight of proxy firms. In particular, the NAM supports efforts to require proxy firms to offer companies an opportunity to review and provide feedback on draft recommendations, ensure that investors have access to company responses and prevent proxy firms from distorting company decisions and investor votes by offering consulting services to the same companies whose governance is the subject of their voting advice.

The NAM supports H.R. 4589, sponsored by Rep. Steil. Included as Title VI of the Protecting Americans' Retirement Savings from Politics Act, Rep. Steil's legislation 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 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.

Title VII—Liability for Certain Failures to Disclose Material Information or Making of Material Misstatements

The 2020 proxy firm rule clarified that proxy voting advice constitutes a solicitation under the Exchange Act, subjecting proxy firms 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, the standards under which that liability may apply have been significantly weakened.

The NAM supports H.R. 4590, sponsored by Rep. Steil. Included as Title VII of the Protecting Americans' Retirement Savings from Politics Act, Rep. Steil's legislation 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 change is critical to ensuring that proxy firm clients have access to the material information they need to make fully informed voting decisions.

Title VIII—Duties of Investment Advisors, Asset Managers, and Pension Funds

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 ESG ratings organizations and may be making proxy voting decisions based on criteria divorced from shareholders' financial best interests.

The NAM supports H.R. 4648, sponsored by Rep. Barry Loudermilk (R-GA). Included as Title VIII of the Protecting Americans' Retirement Savings from Politics Act, Rep. Loudermilk's legislation would require institutional investment managers 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.

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 Americans the information they need to make decisions about how their savings are managed.

Title IX—Protecting Americans' Savings

Robo-voting allows proxy firms to automatically cast votes on their clients' behalf—in line with the proxy firm's recommendations and without any review by the asset manager. 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.

The NAM supports H.R. 4656, sponsored by Rep. Zach Nunn (R-IA). Included as Title IX of the Protecting Americans' Retirement Savings from Politics Act, Rep. Nunn's legislation would prevent institutional investors from outsourcing proxy voting decisions to proxy advisory firms via the firms' robo-voting services. This prohibition on robo-voting 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.

Title X—Empowering Shareholders

Many Americans participate in passively managed funds, which are designed to track a certain set of companies within an industry or the economy writ large. For example, most institutions offer a version of an S&P 500 fund, which simply holds shares proportionally of every company in the S&P 500 index. As new companies are added to or dropped from the index, or their relative size increases or decreases, the fund will make asset allocation changes accordingly. The managers of these funds do not exercise any independent judgment with respect to its holdings; they simply track the index. But, in some cases, these *passive* managers have taken an *active* role in companies' corporate governance by leveraging the fund's holdings via proxy votes.

The NAM supports H.R. 4645, sponsored by Rep. Bill Huizenga (R-MI). Included as Title X of the Protecting Americans' Retirement Savings from Politics Act, Rep. Huizenga's legislation would require managers of passive funds to stay passive—which is to say, to defer to the judgment of

companies' boards of directors and to rely on those directors' fiduciary duty to shareholders. Unless instructed otherwise by their clients, passive funds would be required to vote in alignment with a company's voting recommendations on most proxy ballot measures, with exceptions for issues like director elections and executive compensation. Passive funds could also choose to abstain from voting. These reforms would ensure that fund managers are appropriately representing the Main Street investors who have chosen to participate in a passive fund.

Title XI—Protecting Retail Investors' Savings

Asset managers have a legal obligation to act in an investor's best interest. Increasingly, these institutions face significant pressure to define "best interest" to incorporate a wide range of non-financial factors, including ESG criteria that prioritize agendas other than long-term value creation.

The NAM supports H.R. 4600, sponsored by Rep. Andy Barr (R-KY). Included as Title IX of the Protecting Americans' Retirement Savings from Politics Act, Rep. Barr's legislation would amend the Investment Advisers Act to define an investor's best interest to be based solely on pecuniary factors (i.e., those that will have a material effect on the financial returns of an investment). The bill would prevent asset managers from subordinating pecuniary factors to any non-pecuniary factors unless directed by a client. This change would preserve Main Street investors' ability to invest in ESG funds that prioritize social goals over investment returns if they so choose, but it would otherwise prohibit asset managers from endangering Main Street investors' retirement security by pursuing goals unrelated to shareholder value creation.

II. The Businesses Over Activists Act

The NAM strongly supports the Businesses Over Activists Act (H.R. 4655), sponsored by Rep. Ralph Norman (R-SC).

The SEC's policy of requiring the inclusion of certain shareholder proposals on public company proxy ballots is a clear violation of the First Amendment's prohibition on government-compelled speech. It is unlawful for the federal government to force companies to speak on these politically motivated proposals and to require them to subsidize activists' speech by publishing proposals in their proxy materials.

The Businesses Over Activists would prevent the SEC from compelling companies to include any shareholder proposal on their proxy ballots. In so doing, the bill would protect manufacturers' First Amendment rights and prevent companies and their shareholders from being forced to consider irrelevant and politically motivated proposals on an annual basis.

III. The GUARDRAIL Act

The NAM strongly supports the Guiding Uniform and Responsible Disclosure Requirements and Information Limits Act (H.R. 4790), sponsored by Rep. Bill Huizenga (R-MI).

Over the past two years, the SEC has expanded its regulatory ambit into policy areas not traditionally subject to Commission action. In particular, the SEC's focus on ESG issues has undermined the long-settled materiality standard governing public company disclosure obligations. This departure from materiality has in many instances led to disclosure requirements justified solely by policy concerns outside the SEC's purview, a concerning trend for an agency whose disclosure rules should be designed to protect investors and facilitate capital formation.

International financial regulators are also taking steps to increase corporate disclosure obligations beyond the material information that investors need. The European Union's Corporate Sustainability

Reporting Directive is based on the concept of “double materiality,” requiring disclosure of information necessary to understand a business’s sustainability impact, not its financial performance. And the EU’s Corporate Sustainability Due Diligence Directive would go even further, requiring companies to take steps to identify and mitigate certain environmental and social impacts throughout their value chains.

The GUARDRAIL Act would take important steps to rein in this onslaught and block ESG disclosure mandates that require reporting beyond material information. Manufacturers encourage the Committee to support the following reforms, which would prevent regulators from increasing costs and liability for manufacturers and overwhelming investors with a deluge of irrelevant information.

Title I—Mandatory Materiality Requirement

The Supreme Court has held that information is only material if there is a “substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” Investors are not unanimous in what, if any, climate and ESG metrics they would like to see from public companies, so the materiality standard’s emphasis on the *reasonable* investor focuses public company disclosures on metrics that actually drive value creation and long-term shareholder return. Unfortunately, the SEC’s proposed ESG mandates would require disclosures in excess of this time-tested and well-understood standard.

The NAM supports H.R. 4168, sponsored by Rep. Huizenga. Included as Title I of the GUARDRAIL Act, Rep. Huizenga’s legislation would allow the SEC to require disclosure only of information that is material to a shareholder’s voting or investment decision pursuant to the Supreme Court’s materiality definition. Limiting the SEC’s authority to mandate immaterial disclosures would reduce costs for public companies while also ensuring that their reports are useful to investors.

Title II—SEC Justification of Non-Material Disclosure Mandates

The SEC’s regulatory onslaught has resulted in disclosure obligations for public companies that are not grounded in materiality. These disclosures exceed the SEC’s statutory authority and overwhelm investors with information that is not relevant to long-term value creation.

The NAM supports H.R. 4628, sponsored by Rep. Alex Mooney (R-WV). Included as Title II of the GUARDRAIL Act, Rep. Mooney’s legislation would require the SEC to maintain a list of non-material disclosure requirements and provide a justification for why each disclosure is necessary. It would also clarify that a company choosing not to disclose non-material information would not be subject to a private right of action. These reforms would limit non-material disclosure obligations and protect companies from the increased liability that often flows from such requirements.

Title III—Public Company Advisory Committee

The SEC receives regular counsel from private sector experts via its advisory committees. At present, the SEC’s four advisory committees include investor, small business, asset management and fixed income participants—but there is not a committee dedicated to issues facing publicly traded companies, despite the SEC’s regulatory focus on the rules governing these businesses.

The NAM supports H.R. 4652, sponsored by Rep. Frank Lucas (R-OK). Included as Title III of the GUARDRAIL Act, Rep. Lucas’s legislation would establish a new Public Company Advisory Committee at the SEC. The Advisory Committee would provide the SEC with advice on how its rules and regulations impact public companies; its membership would be comprised of representatives from public companies and other experts on corporate governance, capital formation and the proxy

process. Ensuring that public company voices are heard in the SEC’s decision-making process would help guide the Commission toward rules that support capital formation and business growth rather than costly and unnecessary regulatory burdens.

Title IV—Protecting U.S. Business Sovereignty

The EU’s Corporate Sustainability Reporting Directive will significantly broaden ESG reporting requirements in the EU, requiring disclosure from many businesses based on the novel concept of “double materiality.” The CSRD came into force this year, and companies’ reporting obligations will begin to take effect in 2024.

The European Commission proposed the Corporate Sustainability Due Diligence Directive in February 2022, and it is currently moving through the EU’s legislative process. If adopted, it would apply to U.S.-based manufacturers with at least €300 million in revenue in the EU—a wide range of multinational job-creators.

The NAM supports H.R. 4653, sponsored by Rep. Dan Meuser (R-PA). Included as Title IV of the GUARDRAIL Act, Rep. Meuser’s legislation would require the SEC to conduct a study on the potential detrimental impacts of the CSRD and the CSDDD on U.S. companies, consumers and investors. The study would also include policy recommendations on ways to mitigate these impacts. Better understanding the effects that the CSRD and the CSDDD will have on the U.S. economy will enable the federal government to better respond to such an overreaching and costly burden on American businesses.

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Manufacturers strongly support the Financial Services Committee’s efforts to rein in the SEC’s regulatory overreach, keep activists out of the boardroom and protect Americans’ investments in manufacturing growth. The NAM respectfully encourages the Committee to approve the Protecting Americans’ Retirement Savings from Politics Act, the Businesses Over Activists Act and the GUARDRAIL Act, and we look forward to working with you to ensure that manufacturers can continue to drive economic expansion in the U.S. and support American competitiveness on the world stage.

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, Policy