Chris Netram

Managing Vice President,
Tax and Domestic Economic Policy

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The Honorable Bill Huizenga
Chairwoman
Subcommittee on Oversight and Investigations
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Al Green
Ranking Member
Subcommittee on Oversight and Investigations
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Huizenga and Ranking Member Green:

On behalf of the National Association of Manufacturers, I write to thank you for holding today's Subcommittee on Oversight and Investigations hearing to provide oversight of the Securities and Exchange Commission. Congressional oversight of the SEC's Office of the General Counsel is critical to ensuring that the agency operates within its statutory authority and remains responsive to the American people.

The SEC's aggressive rulemaking agenda is already having a significant impact on job creation, capital formation and business growth at both publicly traded and privately held manufacturers across the country. The OGC is charged with providing direction to the Commission as it considers and promulgates new rules, particularly as it relates to the agency's legal authority to adopt or enforce a particular policy and its obligations to follow the rulemaking procedures required under the Administrative Procedure Act. Unfortunately, the SEC's actions over the past two years have in many instances exceeded the authority granted to the agency by Congress, infringed on manufacturers' constitutional rights and violated critical procedural safeguards.

The NAM respectfully encourages the Subcommittee to exercise robust oversight of the OGC and the SEC writ large so as to rein in the agency's regulatory overreach and ensure that manufacturers are protected from costly—and potentially unlawful—regulatory burdens.

I. The SEC's aggressive regulatory agenda exceeds its statutory authority.

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 environmental, social and governance 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.

The SEC is legally constrained by the confines of its statutory authority,[1] and that authority is centered on facilitating the provision of material information for the protection of investors. As recently as 2016, the SEC itself made clear that "disclosure relating to environmental and other matters of social concern should not be required of all registrants unless appropriate to further a

[1] *See, e.g., Global Tel*Link v. FCC*, 866 F.3d 397, 412 (D.C. Cir. 2017) (vacating an FCC regulation as "beyond the statutory authority of the Commission" where the agency acted to further a "desirable social policy" while ignoring statutory limits).

specific congressional mandate or unless, under the particular facts and circumstances, such matters are material."[2] To the extent that the SEC's proposed ESG reporting requirements exceed material disclosures necessary for a reasonable investor to understand the total mix of information available about an issuer and to make a corresponding investing decision, they are unlawful.[3]

For instance, the Commission's proposed climate disclosures rule would mandate reporting on public companies' so-called "Scope 3" emissions: those attributable to the suppliers and customers within their value chains. But Scope 3 emissions data is unlikely to be material to a shareholder's investing decisions, especially given that the difficulties associated with tracking and reporting Scope 3 emissions and the evolving and uncertain nature of the relevant estimation and modeling frameworks may often render the data unrepresentative or unreliable. Absent a robust link to shareholder value creation, the Scope 3 mandate, like many other provisions in the climate rule, represents the SEC pursuing substantive outcomes with respect to major questions about climate policy—not protecting investors.

Similarly, the SEC has taken steps in several rulemakings to institute substantive governance mandates on public companies via disclosure requirements. For example, the recently finalized share repurchase disclosure rule imposes burdensome reporting requirements designed to discourage companies from returning capital to their shareholders through stock buybacks. And both the climate disclosures rule and the cybersecurity disclosures rule include reporting obligations triggered by whether or not a company adopts the SEC's preferred approach to oversight and management of climate and cybersecurity risks. This genre of disclosures is clearly an attempt to micromanage corporate governance decisions better left to independent boards of directors elected by a company's shareholders. Manufacturers are leaders in taking innovative, company-specific approaches to addressing these important challenges. But, as Commissioner Peirce has noted, the SEC is now in the business of "not only asking companies to tell [the SEC] what they do, but suggesting how they might do it."[4]

These examples are illustrative of the SEC's across-the-board regulatory overreach. The NAM respectfully encourages the Subcommittee to take steps to rein in this onslaught, including by blocking ESG disclosure mandates that require reporting beyond material information and by preventing the SEC from micromanaging company governance of ESG topics.

II. The SEC's politicization of the proxy process infringes on public companies' First Amendment rights.

The SEC in recent years has taken steps to empower activists at the expense of public companies and their long-term shareholders. In October 2021, the Division of Corporation Finance issued Staff Legal Bulletin 14L, which effectively prohibits companies from excluding from the proxy ballot any shareholder proposal related to ESG topics of "broad societal impact," granting activists special access to the proxy ballot to pursue ESG causes. Then, in July 2022, the SEC proposed amendments to Rule 14a-8 designed to make it easier for activists to flood the proxy ballot with substantially implemented, duplicative and rejected proposals. Companies are now significantly less likely to receive no-action relief when they seek to exclude extraneous proposals.

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[2] *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.

[3] *See Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 314–316 (2014) (noting that courts routinely hold unlawful agency action in violation of statutory limits on agencies' authority); *see also Reuters Ltd. v. FCC*, 781 F.2d 946, 95 (D.C. Cir. 1986) (explaining that an agency may not "deviate from its rules in order to achieve what it deems to be justice").

[4] *We are Not the Securities and Environment Commission - At Least Not Yet*. Commissioner Hester M. Peirce (21 March 2022). *Available at* https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321.

The result of these changes is that companies are increasingly required to include activist proposals on their proxy ballot, irrespective of whether a proposal has any nexus to their business or operations. Forcing companies to speak on these policy proposals and to subsidize activists' speech are clear violations of the First Amendment's prohibition on government-compelled speech.

Rule 14a-8 outlines the circumstances in which "a company *must* include a shareholder's proposal in its proxy statement,"[5] and the SEC's no-action letters are the definitive authority as to whether a company can exclude a given proposal. Because Rule 14a-8 "plainly alters the content of [companies'] speech," it is "a content-based regulation of speech"[6]—especially given that publishing and speaking on activists' proxy ballot proposals is certainly not "limited to purely factual and uncontroversial information."[7] The NAM recently intervened in litigation to show that the SEC's actions dictating the content of public company proxy ballots are unlawful.[8]

At a minimum, the NAM respectfully encourages the Subcommittee to take steps to block the SEC's recent politicization of the proxy process, including by rescinding SLB 14L and the amendments to Rule 14a-8 proposed in 2022. More broadly, the NAM urges the Subcommittee to make clear to the SEC that Rule 14a-8 itself exceeds the Commission's statutory authority and that its compelled-speech regime violates public companies' First Amendment rights.

III. The SEC has failed to comply with the APA's procedures for lawful rulemaking.

The SEC in recent years has also shown a concerning disregard for the rulemaking procedures required by the APA. Robust public comment and reasoned agency decision-making are hallmarks of appropriate and lawful agency action, yet the SEC has repeatedly prioritized its policy agenda over its obligations to the American public.

For example, in 2021 the SEC abruptly reversed course with respect to the Commission's 2020 rule providing for sensible oversight of proxy advisory firms. In a series of coordinated actions in June 2021, the SEC announced it would revisit the 2020 rule and suspend enforcement of the rule; the SEC also made clear to a leading proxy firm in a court filing that the decision to suspend enforcement granted proxy firms relief from the rule's compliance requirements. 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 APA, was unlawful.[9]

Then, in July 2022, the SEC finalized its rescission of critical provisions of the 2020 rule via an abbreviated notice-and-comment process that Commissioner Uyeda described as a "regulatory seesaw" that "does not reflect administrative 'best practices' that promote long term reliance and confidence by market participants in the stability of important areas of securities regulation."[10] Critically, at no point during this truncated rulemaking did the SEC provide any legitimate justification for why the same record that supported the 2020 rule two years prior suddenly required its

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[5] 17 C.F.R. 240.14a-8 (emphasis added).

[6] *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

[7] *Id.* at 2372.

[8] *See* Mtn. for Leave to Intervene, *National Center for Public Policy Research v. SEC*, No. 23-60230 (5th Cir.).

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

[10] *Statement on Final Rule Amendments on Proxy Voting Advice*. Commissioner Mark Uyeda (13 July 2022). *Available at* https://www.sec.gov/news/statement/uyeda-statement-amendments-proxy-voting-advice-071322.

rescission, yet another violation of the APA. The NAM's lawsuit challenging the rescission as unlawful under the APA is currently pending before the Fifth Circuit Court of Appeals.[11]
This disregard for appropriate rulemaking procedures also appears in other contexts. In September 2021, the SEC's Division of Trading and Markets issued a no-action letter expanding the application of Rule 15c2-11 (a rule designed to protect retail investors in over-the-counter equity securities) to include fixed-income securities (such as corporate bonds issued under Rule 144A, which are only available to sophisticated institutional investors) for the first time ever. This reversal of 50 years of Commission and industry practice was adopted without any opportunity for public comment or justification for such an unprecedented change. Private companies will soon be required to make detailed financial information about their business publicly available pursuant to this novel and unlawful interpretation.[12]

The NAM respectfully encourages the Subcommittee to hold the SEC to account for failing to allow for robust public comment on its proposed rules and avoid arbitrary and capricious regulatory actions. Reversing the SEC's rescission of the 2020 proxy firm rule and its reinterpretation of Rule 15c2-11 are critical first steps to restoring an appropriate, lawful approach to rulemaking at the Commission.

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Manufacturers strongly support the Subcommittee's efforts to provide appropriate oversight of the SEC's aggressive rulemaking agenda and ensure that the OGC is providing appropriate regulatory guardrails for the Commission. 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,

Chris Netram
Managing Vice President, Tax and Domestic Economic Policy

[11] *See Nat'l Ass'n of Mfrs. v. SEC,* No. 7:22-cv-163-DC (5th Cir.).

[12] 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; *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.