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December 24, 2021

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File No. S7-17-21: *Proxy Voting Advice*

Dear Ms. Countryman:

The National Association of Manufacturers ("NAM") appreciates the opportunity to provide comment to the Securities and Exchange Commission ("SEC") on File No. S7-17-21, the Commission's proposed rule[1] to rescind key portions of its 2020 rule on proxy voting advice.

As the largest manufacturing trade association in the United States and the voice of manufacturers of all sizes in every industrial sector, the NAM has long supported a proxy process that enables smart business growth and strong investor returns. A well-calibrated proxy process enables company management to engage in a productive dialogue with shareholders and ultimately bolsters America's world-leading capital markets—which are critical for capital formation and long-term growth in the manufacturing industry.

Proxy advisory firms play an important role in the proxy process by providing voting research, recommendations, and other services to institutional investors. Yet as their influence has increased in recent years, due in large part to the increase in institutional ownership of American stocks, the regulatory guardrails under which these firms operate have failed to keep pace. Until recently, there has been little-to-no regulation of these powerful entities—and, as such, minimal accountability for their conflicts of interest, opaque methodologies, one-size-fits-all policies, propensity for errors and misleading statements, and unwillingness to engage with publicly traded companies.

In response to these problematic facets of the firms' business models, the SEC as early as 2010 began to undertake a bipartisan effort to understand the impact that proxy firms have on the market. Over the following years, the Commission took steps to investigate proxy firms' substantive mistakes and procedural shortcomings and to propose solutions to institute appropriate oversight, increase transparency, and address the firms' outsized influence. A decade of careful, bipartisan policymaking culminated in the SEC's 2020 rule: Exemptions From the Proxy Rules for Proxy Voting Advice.[2] This commonsense regulation clarified that the dissemination of proxy voting advice generally constitutes a solicitation and thus that proxy firms are subject to the federal proxy rules. As such, the 2020 reforms increased transparency into proxy firms' conflicts of interests, provided greater information to investors (via the new mechanism by which companies would receive the firms' recommendations and investors could access companies' responses thereto), and applied the proxy rules' antifraud standards to proxy firms.

[1] *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.

[2] *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.

The NAM strongly supported the 2020 rule. In our comment letter on the 2019 proposal[3] that the SEC finalized in 2020, we noted that the rule's reforms "would represent a significant change in how issuers and investors experience the influence of proxy advisory firms" and that the issuer engagement provisions, a tentpole of the rule, would "improve the accuracy and reliability of [proxy firms'] recommendations."[4] Upon the rule's finalization, we said that it would "protect the retirement savings of manufacturing workers and millions more American families from proxy firms' errors and conflicts of interests."[5]

The NAM is extremely concerned that the SEC has proposed to rescind these critical reforms and reverse course on a decade's worth of bipartisan, consensus-driven policymaking. If finalized, the proposed rule would remove vital safeguards designed to improve the accuracy, reliability, and transparency of proxy firm recommendations. By fully rescinding the requirement that proxy firms provide their recommendations to issuers and notify investors of any company responses, the proposed rule would diminish the overall mix of decision-useful information available to investors. And revoking the rule's antifraud protections would put investors at considerable risk from proxy firms' false and misleading statements. Moreover, the proposal comes just a year after the 2020 rule was finalized, before many of its provisions (including the issuer engagement requirements) could take effect and be fairly evaluated. This reversal, especially when no new information has emerged to justify such a significant change, would set a dangerous precedent of regulatory uncertainty and capriciousness at a time when businesses and investors—and the capital markets writ large—need regulatory stability and reliable rules of the road.

The NAM strongly opposes the proposed rule and the SEC's efforts to rescind the 2020 rule's issuer engagement and antifraud provisions. Manufacturers respectfully urge the SEC to reconsider its proposed modifications and to allow the 2020 rule to take effect, in full, in advance of the 2022 proxy season. The rule's commonsense investor protections and procedural safeguards are vital to ensuring that the proxy process prioritizes investors' long-term best interests through accuracy, reliability, and transparency.

I. The NAM opposes the SEC's efforts to rescind the 2020 rule's issuer engagement provisions, which were the product of a decade of bipartisan consideration and are critical to ensuring that investors have access to timely, accurate information on which to base proxy voting decisions.

The NAM has long called for a more robust, constructive dialogue between issuers and proxy firms in order to ameliorate the impact of the firms' propensity for errors and adherence to one-size-fits-all guidelines.[6] Allowing issuers to review draft proxy firm reports, for instance, would give them the opportunity to identify errors and explain methodological differences between the company's approach and the firms' recommendations. Including an issuer's "dissenting opinion" alongside the proxy voting advice disseminated to proxy firms' clients would give investors more decision-useful information about the proxy vote in question. Such measures would not impugn the independence of

[3] *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.

[4] NAM Comments on File No. S7-22-19 (3 February 2020). *Available at* https://www.sec.gov/comments/s7-22-19/s72219-6735396-207626.pdf.

[5] *Manufacturers Score "Major Win" on Final SEC Proxy Advisory Firm Regulations*. National Association of Manufacturers (22 July 2020). *Available at* https://www.nam.org/manufacturers-score-major-win-on-final-sec-proxy-advisory-firm-regulations-9894/.

[6] *See, e.g.,* NAM Comments on 2019 Proposed Amendments, *supra* note 4, at 3 ("Proxy firm reports and recommendations feature a profusion of errors and misleading statements…Proxy firms have been steadfastly resistant to engaging in a productive dialogue with issuers to correct errors and misunderstandings.").

proxy firms or their recommendations but, rather, would improve the accuracy and reliability of proxy firm recommendations and increase information availability for investors.

The 2020 rule's issuer engagement provisions are more limited than some commenters, including the NAM, have supported. Yet they are still important, necessary steps to enhancing the accuracy and reliability of proxy voting advice. Under the rule, proxy firms are required to make their voting recommendations available to issuers after they have been finalized. This provision allows public companies to understand the information being shared with the marketplace about their businesses and to evaluate the application of a proxy firm's general guidelines to their specific facts and circumstances. The 2020 rule would also require that proxy firms have a mechanism in place that allows investors to become aware of any responses to their recommendations that companies file. This straightforward provision ensures that investors have access to all relevant information before casting proxy votes and can better understand how proxy firm recommendations interact with company policies. The rule envisages a more well-rounded information ecosystem for the proxy process, in which investors have more, and more accurate, information on which to base proxy voting decisions. The NAM supports this goal.

The NAM is hardly unique in this regard—the SEC has thoroughly investigated this issue over the past decade, hearing from a wide variety of commenters and coming to the conclusion in the 2020 rule that productive engagement between issuers and proxy firms is lacking. Further, the SEC's research has made clear that regulatory intervention to enhance issuer-proxy firm engagement, including the provisions of the 2020 rule, would improve the accuracy and reliability of the proxy voting information on which investors rely. Given that the SEC made the decision in 2021 not to allow the 2020 rule to take effect, it is difficult to understand what might have changed to cause the SEC to reverse course. The NAM strongly supports maintaining the 2020 rule in full, and we respectfully encourage the SEC not to turn its back on the past decade of deliberation and careful consideration that informed the rule's targeted issuer engagement reforms.

A. The SEC, Congress, and the NAM have for years considered enhanced issuer engagement to be important to enhancing the quality of proxy voting advice.

In 2010 under Chair Mary Schapiro, the SEC's Concept Release on the U.S. Proxy System[7] identified conflicts of interest[8] and a lack of accuracy and transparency as key concerns related to proxy advisory firms. Specific to accuracy and transparency, the release notes that "voting recommendations by proxy advisory firms may be made based on materially inaccurate or incomplete data" and that "the analysis provided to an institutional client may be materially inaccurate or incomplete."[9] It further raises the concern that proxy firms "may base their recommendation on [a] one-size-fits-all governance approach."[10] The release also acknowledges that companies often wish to engage with proxy firms to address these issues, but that the firms "may be unwilling, as a matter of policy, to accept any attempted communication from the issuer or

[7] *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.

[8] The NAM continues to believe in the importance of enhancing transparency around proxy firms' conflicts of interest, and we appreciate that the SEC has not proposed to rescind the 2020 rule's requirement that proxy firms provide specific and prominent conflicts disclosures. Given that this provision would not be impacted by the proposed rule, our comments focus exclusively on the 2020 rule's issuer engagement and antifraud requirements. Nevertheless, manufacturers continue to support robust disclosure of proxy firms' conflicts of interest, and the NAM respectfully encourages the SEC to remain steadfast in maintaining this important aspect of the 2020 rule.

[9] 2010 Concept Release, *supra* note 7, at 43012.

[10] *Ibid.*

to reconsider recommendations in light of such communications" when companies seek to correct mistakes or misleading statements.[11]

The 2010 release notes that market participants felt that "additional oversight mechanisms could improve the likelihood that voting recommendations are based on materially accurate and complete information" and, specifically, 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."[12] The regulatory solutions contemplated by the release include disclosures about proxy firms' internal accuracy controls and research capabilities, information on the firms' processes to interact with issuers and address issuer appeals, and a requirement that proxy firms publicly file their voting recommendations with the SEC.[13]

The Commission has continued to consider these issues and potential regulatory solutions since the 2010 concept release was published. In 2013 under Chair Mary Jo White, the SEC held a Roundtable on Proxy Advisory Services, at which participants discussed "the current use of proxy advisory services" and "the transparency and accuracy of recommendations by proxy advisory firms."[14] In 2018 under Chair Jay Clayton, the SEC held a Roundtable on the Proxy Process, at which panelists discussed "[w]hether issuers are being given an appropriate opportunity to raise concerns if they disagree with a proxy advisory firm's recommendations, including, in particular, if the recommendation is based on erroneous, materially incomplete, or outdated information."[15]

Congress has weighed in on this important topic as well. In 2016, the House Financial Services Committee's Subcommittee on Capital Markets and Government Sponsored Enterprises held a hearing[16] on a draft bill from Reps. Sean Duffy (R-WI) and John Carney (D-DE), the Proxy Advisory Firm Reform Act,[17] which would have required proxy firms to register with the SEC,[18] adopt "procedures sufficient to permit companies receiving proxy advisory firm recommendations access in a reasonable time to draft recommendations, with an opportunity to provide meaningful comment thereon,"[19] and employ an ombudsman charged with receiving and resolving "complaints about the accuracy of voting recommendations from the subjects of the proxy advisory firm's voting recommendations."[20] The bill was approved by the House Financial Services Committee on a bipartisan basis in both the 114th Congress[21] (as the Corporate Governance Reform and

[11] *Ibid.*

[12] *Ibid.*

[13] *See id.* at 43013.

[14] *SEC Announces Agenda, Panelists for Roundtable On Proxy Advisory Services* (27 November 2013). *Available at* https://www.sec.gov/news/press-release/2013-253.

[15] *Statement Announcing SEC Staff Roundtable on the Proxy Process* (30 July 2018). *Available at* https://www.sec.gov/news/public-statement/statement-announcing-sec-staff-roundtable-proxy-process.

[16] *Legislative Proposals to Enhance Capital Formation, Transparency, and Regulatory Accountability* (17 May 2016). House Committee on Financial Services, Subcommittee on Capital Markets and Government Sponsored Enterprises (114th Cong.). *See* https://financialservices.house.gov/events/eventsingle.aspx?EventID=399818.

[17] *Proxy Advisory Firm Reform Act of 2016* (Draft). 114th Cong. (2016). Available at https://financialservices.house.gov/uploadedfiles/05.17.2016_cm_proxy_advisory_firm_reform_act_of_2016.pdf.

[18] *See id.* at 5.

[19] *Id.* at 16.

[20] *Ibid.*

[21] Recorded Vote No. FC-114 (16 June 2016).

Transparency Act[22]) and the 115th Congress[23] (having been reintroduced[24] by Rep. Duffy and Rep. Gregory Meeks (D-NY)). It passed the House of Representatives via a bipartisan vote on December 20, 2017.[25]

In 2018, the Senate Banking Committee considered[26] related bipartisan legislation, the Corporate Governance Fairness Act, introduced by Sens. Jack Reed (D-RI), Thom Tillis (R-NC), Heidi Heitkamp (D-ND), John Kennedy (R-LA), Doug Jones (D-AL), and David Perdue (R-GA).[27] The Senate bill would have given the SEC authority to conduct examinations of proxy firms to investigate potential false statements or omissions of material facts.[28] It also would have required the SEC to produce a report on potential protections necessary to enable investors to "make informed investment decisions" based on proxy firm recommendations.[29]

The NAM has long believed that enhanced engagement among proxy firms, issuers, and investors is critical to improving the accuracy and reliability of proxy firm recommendations. In 2016, in support of the Corporate Governance Reform and Transparency Act, we noted that proxy firms "make decisions on what new corporate governance policies should be adopted by public companies, with little input from these key stakeholders."[30] In 2018, we said that proxy firms "offer little in the way of transparency or dialogue with the issuers impacted by their recommendations," resulting in a "black box quasi-regulatory regime that imposes a one-size-fits-all approach to corporate governance on America's public companies."[31]

The NAM submitted two letters in conjunction with the 2018 Roundtable on the Proxy Process. In October 2018,[32] we called for investor protection guardrails when "an issuer believes a proxy firm has significantly misstated an issue":[33]

> *"In all cases, proxy firms should provide issuers with a copy of the recommendation with sufficient time for review; if a recommendation is contested, the firm should (1) give the issuer an opportunity to respond to the recommendation, (2) disclose and justify the impact of any significant departures in methodology between the proxy firm and the issuer (e.g., differences in determining peer group, disclosed compensation, or business metrics), (3) include in the materials provided to the investment adviser a dissenting opinion from the*

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[22] *Corporate Governance Reform and Transparency Act of 2016*. H.R. 5311, 114th Cong. (2016).

[23] Recorded Vote No. FC-109 (14 November 2017).

[24] *Corporate Governance Reform and Transparency Act of 2017*. H.R. 4015, 115th Cong. (2017).

[25] Roll Call No. 702 (20 December 2017).

[26] *Proxy Process and Rules: Examining Current Practices and Potential Changes* (6 December 2018). Senate Committee on Banking, Housing, and Urban Affairs (115th Cong.). *See* https://www.banking.senate.gov/hearings/proxy-process-and-rules-examining-current-practices-and-potential-changes.

[27] *Corporate Governance Fairness Act*. S. 3614, 115th Cong. (2018).

[28] *See id.* at 5.

[29] *Id.* at 8.

[30] *Manufacturers Encouraged by Legislation on Proxy Advisory Firms*. National Association of Manufacturers (16 June 2016). *Available at* https://documents.nam.org/tax/Manufacturers_Encouraged_By_Legislation_On_Proxy_Advisory_Firms.pdf.

[31] NAM Comments on File No. 34-83463 (17 July 2018). *Available at* https://www.sec.gov/comments/34-83463/cll7-4127801-171747.pdf.

[32] NAM October 2018 Comments on File No. 4-725 (30 October 2018). *Available at* https://www.sec.gov/comments/4-725/4725-4581799-176285.pdf.

[33] *Id.* at 4.

issuer explaining the reasoning behind management's preferred course of action and/or highlighting errors in the firm's report, and (4) disable any robo-voting policies on the recommendation."[34]

In March 2019,[35] we specifically called on the SEC to condition proxy firms' reliance on the Rule 14a-2(b) exemptions from the proxy solicitation rules' information and filing requirements on their adoption of robust issuer engagement practices:[36]

> *"Proxy firms should allow all issuers, not just the largest companies, access to draft recommendations. Currently, one of the two leading firms only provides draft reports to companies in the S&P 500, while the other charges issuers a fee to review recommendations; going forward, productive engagement with all issuers should be the norm.*
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> *"Proxy firms should give issuers sufficient time to review draft recommendations. A review period of at least five business days would provide for enough time for companies to spot mistakes, correct misunderstandings, and proactively engage with their investors.*
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> *"Proxy firm reports should include an issuer's dissenting opinion explaining the reasoning behind management's preferred course of action and/or highlighting errors in the firm's report in the event a recommendation is contested. Proxy firms would be under no obligation to modify any recommendation; the dissenting opinion would simply give investors additional information from the company's perspective.*
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> *"Proxy firms should disable any default vote settings in the event that a recommendation is contested by an issuer. This would prevent automatic votes on contentious issues (while smoothing the process on non-contested issues) and instead allow an investment adviser time to make a considered decision by weighing the relative merits of the firm's recommendation and a company's dissenting opinion."*[37]

It is abundantly clear that proxy firms' reluctance, and often outright refusal, to engage with issuers results in lower-quality information being made available to investors. As such, the NAM has consistently advocated for reforms that would give public companies an opportunity to review proxy firm recommendations and share their perspectives on said recommendations with the firms and with investors. When the SEC in 2019 proposed to institute issuer engagement requirements (including provisions related to both issuer review and issuer response), it did so with a full understanding of the impact of the status quo (i.e., the troubling lack of productive dialogue between issuers and proxy firms) and of the years of bipartisan consensus that regulatory action would be appropriate to enhance issuer-proxy firm engagement for the ultimate benefit of the investors who rely on proxy firms' voting recommendations.

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[34] *Id.* at 5.

[35] NAM March 2019 Comments on File No. 4-725 (5 March 2019). *Available at* https://www.sec.gov/comments/4-725/4725-5020171-182986.pdf.

[36] *Id.* at 5.

[37] *Id.* at 6.

B. The NAM supported the amendments proposed in 2019, which would have instituted a robust framework for issuer review of draft proxy firm recommendations and the dissemination of issuer responses to investors.

In light of the preceding decade of bipartisan consensus and the consistent emphasis on the importance of issuer engagement to enhance the accuracy and reliability of proxy firm recommendations, reduce misleading statements, and improve the overall mix of information for investors, the SEC in 2019 proposed a rule[38] to condition the availability of the Rule 14a-2(b) exemptions on proxy firms (or "proxy voting advice businesses" ("PVABs")), "establishing a mechanism that would foster enhanced engagement between proxy voting advice businesses and registrants."[39]

The 2019 proposal would have required, as a condition of the Rule 14a-2(b) exemptions, that PVABs provide issuers with at least five days to review and provide feedback on their draft recommendations.[40] It also would have required PVABs to provide issuers with a "final notice of voting advice" at least two days prior to a recommendation's dissemination to investors so that businesses would have been able to draft a statement in response to the recommendation; said statement would then have been required to be included as a hyperlink in the final PVAB report sent to investors. The 2019 proposing release justifies its issuer engagement process by noting that it would "reduce the likelihood of errors, provide more complete information for assessing proxy voting advice businesses' recommendations, and ultimately improve the reliability of the voting advice utilized by investment advisers and others who make voting determinations, to the ultimate benefit of investors."[41]

The NAM strongly supported the robust issuer engagement framework included in the 2019 proposal. As we said in our February 2020 comment letter:

> *"As a general rule, issuers are not given sufficient time to review the draft recommendations that proxy firms make about their business. (As we have noted, companies outside the S&P 500 are usually given no such opportunity at all.) When issuers attempt to utilize the limited time they receive for review, they have found the proxy firms to be difficult to reach and disinclined to make changes that would result in a more accurate report for investors. Furthermore, the firms issue their reports so close to the issuer's annual meeting that direct communication with shareholders to correct proxy firm errors or misrepresentations is difficult (via a supplemental proxy statement or elsewise), and persistent robo-voting undercuts even that limited opportunity.*
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> *"As the NAM has stated in the past, proxy firms' unwillingness to engage with the issuers on which they are conducting research and making recommendations compounds the many problems that manufacturers face when dealing with the firms. Errors, methodological weaknesses, and one-size-fits-all policy guidelines are damaging enough, but the firms'*

[38] *See* 2019 Proposed Amendments, *supra* note 3.

[39] *Id.* at 66530.

[40] The five-day standard would have applied only to issuers that file their definitive proxy statement at least 45 days in advance of their annual meeting. Issuers filing their definitive proxy statement fewer than 45 days, but more than 25 days, in advance would have been given three days for review, while issuers filing fewer than 25 days in advance would have had no opportunity for review of draft recommendations. *See generally* 2019 Proposed Amendments, *supra* note 3, at 66531. The NAM supported this commonsense tiered framework, which appropriately balanced the needs of issuers and proxy firms given the time pressures of the busy proxy season. *See* NAM Comments on 2019 Proposed Amendments, *supra* note 4, at 10.

[41] 2019 Proposed Amendments, *supra* note 3, at 66530.

reluctance to fix mistakes or hear another side of the story ensures that these flaws persist throughout the drafting process and may ultimately taint the final voting advice."[42]

Our letter on the 2019 proposal specifically endorses the requirement that PVABs give issuers the opportunity to review and comment on draft recommendations, as well as the requirement that issuers have an opportunity to access and submit a response statement on the final report.[43] In fact, we called for enhancements to the provision, requesting that the SEC require a company's full response statement to be included alongside a PVAB's proxy voting advice in lieu of the proposal's hyperlink requirement.[44] We also advocated for a prohibition on PVABs automatically submitting clients' votes without their review in instances in which a company has submitted a response statement.[45] Our letter is clear that an issuer engagement framework "will benefit issuers, proxy firms, and investors alike by improving the quality and accuracy of the firms' recommendations,"[46] and we continue to believe that the 2019 proposal's requirements related to both issuer review and issuer response were an appropriate regulatory response to proxy firms' unwillingness to communicate with public companies.

C. In 2020, the SEC adopted principles-based requirements supported by the NAM that were designed to increase information availability for issuers and investors while responding to concerns raised in response to the 2019 proposal.

In finalizing the proxy advice rule in 2020, the SEC made several notable changes to the 2019 proposal's issuer engagement requirements by adopting a "less prescriptive, more principles-based" approach.[47] Under the 2020 rule, PVABs are required, as a condition of the Rule 14a-2(b) exemptions, to adopt and disclose policies and procedures reasonably designed to ensure that (A) issuers have access to PVABs' proxy voting recommendations at least at the time that said recommendations are disseminated to investors and (B) investors have access to a mechanism by which they can reasonably be expected to become aware of company responses to PVABs' recommendations in a timely manner before a shareholder meeting.[48] These changes were influenced in large part by "concerns raised by commenters regarding the potential unintended consequences" of the 2019 framework, "including those related to timing and the risk of affecting the independence of the advice."[49]

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[42] NAM Comments on 2019 Proposed Amendments, *supra* note 4, at 10.

[43] *See, e.g., id.* at 10 ("[T]he NAM strongly supports the proposed rule's amendments to Rule 14a-2(b) to create a new issuer review and feedback process and allow issuers to submit a statement to be included in the final report via hyperlink. As the proposing release notes, these two new processes would reduce the likelihood of errors, provide investors with more complete information, and improve the reliability of proxy voting advice.").

[44] *See, e.g., id.* at 12 ("The core benefit of the issuer response statement is in the ability for investors to review it side-by-side with the proxy firm recommendation; a hyperlink would make direct comparison more difficult and limit the statement's utility. Moreover, for investors that receive proxy firm materials by mail, or otherwise review the recommendations in a paper format, the hyperlink would be effectively useless.").

[45] *See, e.g., id.* at 15 ("If an asset manager enables automatic submission of all of its votes – including on contested and controversial issues – then its ability to review issuer response statements and make a proactive decision on these important matters is effectively nullified. The proposing release offers a number of suggestions to address this problem; the NAM believes the simplest and most effective would be to condition the 14a-2(b) exemptions on proxy advisory firms disabling the automatic submission of votes if a company submits an issuer response statement under the proposed rule's final notice of voting advice process.").

[46] *Id.* at 11.

[47] 2020 Final Rule, *supra* note 2, at 55107.

[48] *See id.* at 55109.

[49] *Id.* at 55112.

In our comments on the 2019 proposal, the NAM responded to the SEC's questions about the impact of the issuer engagement requirements on the timeliness and independence of proxy voting advice. We were clear that it would be "extraordinarily unlikely that the proposed [issuer engagement] processes would lead to damaging delays" in PVABs' delivery of voting recommendations to their clients[50] and, similarly, that "there is no risk of the proxy advisory firms' independence being threatened by the proposed reforms."[51] However, the SEC weighed the perspectives of the NAM and other supporters of the rule against those of commenters concerned by the potential for unintended consequences under the 2019 framework and promulgated a compromise requirement that grants significant flexibility to proxy advisory firms while still addressing the need for increased engagement with issuers and enhanced information availability for investors.

Though less robust than either the 2019 proposal or the NAM's preferred approach to issuer-proxy firm engagement, the NAM nevertheless strongly supported, and continues to support, the reforms included in the 2020 final rule. The 2020 adopting release acknowledges that public companies "lack an adequate opportunity to engage with and respond to influential proxy voting advice before shareholders vote, potentially inhibiting the accuracy, transparency, and completeness of the information available to those making voting determinations."[52] It further highlights the effect of the lack of issuer engagement on "the mix of information available to shareholders, including the ability of shareholders to benefit from robust discussion."[53] The NAM strongly agrees that these are issues of critical import to a well-functioning, transparent proxy process.

With these issues in mind, the SEC's 2020 rule institutes a straightforward, uncomplicated process to provide issuers and investors with information about PVABs' proxy voting recommendations. The requirement that PVABs share their final recommendations with impacted issuers will ensure that companies can understand the advice and contextualize it for investors, including by identifying any errors or misleading statements. And the requirement that PVABs notify investors of company responses will ensure that shareholders understand company perspectives on a given issue and ultimately have more accurate and complete information on which to base their proxy votes. This provision is particularly critical given that PVABs publish their reports so close to issuers' annual meetings that effective communication with shareholders about the firms' mistakes can be difficult.[54] All told, the increased transparency supported by the rule's issuer engagement provisions will, if allowed to go into effect, enhance the quality and availability of decision-useful information and ultimately improve the accuracy and reliability of the resources on which investors depend to make informed voting decisions.

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[50] *See* NAM Comments on 2019 Proposed Amendments, *supra* note 4, at 11 ("Given that it is in issuers' best interests to respond to proxy firm errors or methodological weaknesses promptly, and to have annual meetings conducted on time and with a quorum, issuers will always be incentivized to complete their review in a timely fashion. Ultimately, the proposed review windows (five days out of 45, or three days out of 25) represent a small share of the full time that a proxy firm has to develop its recommendations…This tiered framework will help ensure that issuers' and proxy firms' work can be completed and delivered to investors in advance of the annual meeting.").

[51] *See id.* at 15 ("First and foremost, the proposing release makes crystal clear that the ability for companies to suggest changes to a recommendation or the data upon which it is based 'does not require proxy voting advice businesses to accept any such suggested revisions.' And the issuer response statement is submitted after a proxy firm report has been finalized; the proxy firm's only obligation is to include the text, or a link thereto, in the version of the report disseminated to clients. The issuer feedback would exist to point out mistakes or offer alternative perspectives – which could be freely set aside if and when a proxy firm believes its facts, or its interpretation thereof, are unassailable.").

[52] 2020 Final Rule, *supra* note 2, at 55102.

[53] *Ibid.*

[54] This dynamic is exacerbated by PVABs' automatic vote execution services, which prevent investors from making a proactive and informed decision based on the full range of information, including company response statements, available to them.

D. The NAM opposes the proposed rule, which would rescind Rule 14a-2(b)'s issuer engagement requirements—effectively gutting the 2020 rule and reducing investors' access to accurate, decision-useful information.

The proposed rule would rescind the critical reforms that the SEC has developed over the past decade. In brief, it would fully withdraw the issuer engagement provisions from the 2020 rule, amending Rule 14a-2(b) to no longer condition proxy firms' reliance on its exemptions on any degree of communication with either issuers or investors.[55] If the proposed rule is finalized, PVABs would no longer be required to provide their recommendations to impacted businesses, nor to have a mechanism in place for investors to become aware of any responses to said recommendations. The proposing release alleges that this change does not represent a "wholesale reversal" of the 2020 rule,[56] but in actuality the issuer engagement provisions were "integral" to the rule given the importance of ensuring that investors "have access to more materially accurate, transparent, and complete information when they vote proxies."[57] The proposed changes are in no way simply "tailored adjustments."[58]

It is deeply concerning that the SEC has proposed to rescind these commonsense investor protections. As discussed, the Commission has over the past decade undertaken an intensive, thorough, thoughtful review of the role that proxy firms play and the potential risks to investors that arise from their lack of transparency and propensity for errors. In 2020, the SEC finalized a rule that, as acknowledged by the 2021 recission, was "intended to help ensure that investors who use proxy voting advice receive more transparent, accurate and complete information on which to make their voting decisions."[59] The 2021 proposal further notes that the 2020 rule's issuer engagement provisions—which the SEC now proposes to reverse—were designed to "facilitate effective engagement between PVABs and registrants, help ensure that registrants are timely informed of proxy voting advice that bears on the solicitation of their shareholders and further the goal of ensuring that PVABs' clients have more complete, accurate and transparent information to consider when making their voting decisions."[60]

These goals are laudable, and the 2020 rule's requirements—simply that PVABs provide their final recommendations to companies and notify investors of company responses—are easy to implement and less burdensome for PVABs than initially proposed. Indeed, the 2021 proposal acknowledges that the 2020 rule was tailored "to avoid imposing undue costs or delays that could adversely affect the timely provision of proxy voting advice."[61] If allowed to go into effect, the 2020 issuer engagement requirements will increase transparency and reduce errors. They will address issuer concerns with proxy firms' processes and methodologies while still allowing, and in fact encouraging, proxy firms to offer independent, useful proxy voting advice to investors. They are a compromise solution at the culmination of a decade-long, bipartisan process of which the SEC should be proud.

Yet rather than celebrate this accomplishment and commit, as it should for all substantial rulemakings, to monitoring marketplace developments and fairly evaluating the rule's impact, the

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[55] *See generally* Proposed Rule, *supra* note 1, at 67387.

[56] *Id.* at 67384.

[57] *Too Important to Regulate? Rolling Back Investor Protections on Proxy Voting Advice.* Commissioner Elad L. Roisman (17 November 2021). *Available at* https://www.sec.gov/news/statement/roisman-proxy-advice-20211117.

[58] Proposed Rule, *supra* note 1, at 67384.

[59] *Ibid.*

[60] *Id.* at 67385.

[61] *Id.* at 67384.

SEC has instead proposed to reverse course *before the key protections in the rule even take effect*. The proposed rule would rescind critical investor protections and allow proxy firms' errors and misleading statements to go unchecked. The NAM opposes the proposed rule, and we respectfully encourage the SEC to reconsider its decision to weaken the 2020 rule's much-needed reforms.

II. The NAM is deeply concerned that the SEC has proposed to reverse course through a process that does not meet the high standards for appropriate and transparent regulatory action.

Despite the significant issues raised by the NAM and a wide variety of other stakeholders over the past decade about the lack of proxy firm engagement with public companies, as well as the robust discussion of the importance of issuer engagement in the 2020 adopting release, the SEC is now proposing to fully rescind the 2020 rule's issuer engagement requirements. If the proposed rule is finalized, PVABs will not be required to engage with public companies in any meaningful manner—not even via the targeted, compromise-driven framework at the heart of the 2020 rule.

This significant change is unsupported by the comment record, not responsive to any changes in the marketplace, and not justified by the reasoning offered in the proposing release. The NAM is deeply concerned by the SEC's process in promulgating the 2021 proposal and discarding years of deliberate rulemaking absent any new information supporting a change in course.

A. Stakeholder issues raised in response to the 2019 proposal were addressed in the 2020 rule and do not justify the proposed rule's dramatic changes.

The primary justification for the proposed rule's changes is the fact that some stakeholders "have continued to express strong concerns" about the 2020 rule's impact.[62] Yet these concerns are not new—they were reflected in the comment docket on the 2019 proposal, and the SEC in its 2020 adopting release explicitly and methodically addressed the many and varied issues raised during the notice-and-comment process. The proposing release fails to explain why these concerns now counsel against the 2020 rule when they did not do so before.[63] It also fails to contend with the fact that the SEC took significant steps to address 2019 commenters' concerns in the 2020 rule.

According to the proposing release, the main theme of these concerns is that the 2020 rule would impact the timeliness and independence of PVABs' proxy voting advice. However, the proposing release does not offer any explanation for how or why the 2020 rule's provisions would affect either timeliness or independence. As discussed, the issuer engagement provisions of the 2020 final rule were a significant compromise, designed in large part to address stakeholder concerns raised in response to the 2019 proposal about the timeliness and independence of proxy voting advice. The proposing release offers no evidence or justification for the proposed rule's reversal beyond the mere existence of these opaque and amorphous "concerns."[64] Once again, the concerns cited are not new, they were explicitly addressed by the 2020 rule, and the SEC has not allowed the issuer engagement provisions to go into effect so it could gather evidence on their impact on PVABs' timeliness and independence.

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[62] *Ibid.*

[63] *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-516 (2009) ("It would be arbitrary and capricious to ignore" that an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy.").

[64] *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (The APA requires agencies to "articulate…a rational connection between the facts found and the choice made") (quotation marks omitted); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221, 136 S. Ct. 2117, 2126, 195 L. Ed. 2d 382 (2016) ("[T]he agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'").

Additionally, the proposing release largely ignores the views of market participants that supported the 2020 rule and believe in the importance of productive engagement between issuers and proxy firms.[65] As discussed, the NAM and many other stakeholders continue to support an issuer engagement framework aligned with the 2019 proposal's requirements, if not more robust. However, these views are not reflected in the proposing release, nor is the widespread support for the 2020 rule's compromise solution. The only stakeholder positions addressed by the proposed rule—or indeed mentioned at all—are the amorphous concerns about timeliness and independence.

Furthermore, the concerns raised about the timeliness and independence of proxy voting advice are simply not credible. The 2020 rule's issuer engagement provisions provide significant flexibility to PVABs and require exactly zero action on their part before a recommendation is finalized. It is implausible that a PVAB's ability to publish independent, unbiased voting advice could be impacted by a requirement that it send its voting recommendations to businesses *after they are finalized*. The NAM believed that even the 2019 proposal's more stringent requirements related to PVABs' *draft* recommendations were extremely unlikely to impact the firms' independence; it is not believable that the 2020 compromise solution would have any impact whatsoever on the independence of PVABs or their voting recommendations.

As the 2020 adopting release makes clear: "[B]ecause Rule 14a-2(b)(9)(ii) does not require proxy voting advice businesses to adopt policies that would provide registrants with the opportunity to review and provide feedback on their proxy voting advice before such advice is disseminated to clients, *the rule does not create the risk that such advice would be delayed or that the independence thereof would be tainted* as a result of a registrant's pre-dissemination involvement."[66] The proposing release offers no reason to believe that this is no longer the case.

B. The NAM is disappointed that the SEC has proposed to preemptively rescind the 2020 rule without any understanding of its impact on investors and issuers.

Notably absent from the proposing release are any new facts that would counsel against fully implementing the 2020 rule's issuer engagement requirements. This is partially due to the SEC's unlawful decision to suspend enforcement of the 2020 rule. As we have said in court, "[t]he SEC's suspension of the Proxy Advice Rule's compliance dates is blatantly unlawful under the Administrative Procedure Act. An agency 'may not alter' a duly promulgated final rule 'without notice and comment, nor does it have any inherent power to stay a final rule.'"[67] In addition to violating the SEC's obligations under the APA, the suspension of the 2020 rule deprived the Commission and the marketplace of valuable information about the rule's impact. Were the SEC requiring PVABs to comply with the lawfully promulgated issuer engagement provisions of the rule, PVABs would already be planning the requisite processes in advance of the 2022 proxy season, and issuers and investors alike would benefit from these provisions in and around 2022 shareholder meetings. Appropriately enforcing the 2020 rule would give the SEC vital information, which the proposing release desperately lacks, about its impact on PVABs, issuers, and investors.

Putting the SEC's unlawful actions aside, it remains the case that even if the relevant portions of the rule were currently in effect, PVABs' first substantive compliance deadlines are all related to the

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[65] *See, e.g., Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) ("[A]n agency cannot ignore evidence contradicting its position.") (quotation marks omitted); *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005) ("The agency may not skew the record in its favor by excluding pertinent but unfavorable information.").

[66] 2020 Final Rule, *supra* note 2, at 55112 (emphasis added).

[67] *National Association of Manufacturers et al. v. SEC*, No. 7:21-cv-183 (W.D. Tex.). *See* Plaintiffs' Complaint for Declaratory and Injunctive Relief at 17 (quoting *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 15 (D.D.C. 2017) and *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017)).

2022 proxy season. If it is unclear why the SEC wants to rescind critical portions of the rule, it is even more unclear why it wants to rescind critical portions of the rule *right now*. The SEC has no new information on the rule's effectiveness or impact, including on the timeliness and independence of PVABs' voting advice. A better approach to addressing stakeholder concerns would be to actually implement the rule, enforce it fairly and in accordance with its substantive requirements, and commit to carefully reviewing its impact on the marketplace.

C. The NAM does not believe that proxy firms' existing voluntary practices are sufficient to protect investors nor a substitute for regulatory action.

As noted by both Commissioner Roisman[68] and Commissioner Peirce,[69] the only major change between July 2020 and November 2021 to which the SEC might be expected to react is the fact that the largest proxy firm, ISS, now provides *fewer* opportunities for issuer engagement. Prior to the 2020 rule, ISS allowed companies in the S&P 500 to review and provide limited feedback on its voting recommendations. It offered this service "to help check the factual accuracy of the data underpinning [its] research."[70] Effective January 1, 2021, ISS has rescinded this service completely.[71] The proposing release at least acknowledges that "ISS does not provide draft proxy voting advice to any United States registrants."[72] It then offers an underwhelming substitute for stakeholders that believe in the importance of issuer-proxy firm engagement: according to the release, "ISS *can*, however, *choose* to engage with registrants."[73] But as the NAM has consistently explained, ISS—and other proxy firms—consistently choose *not* to engage with issuers, highlighting the ineffectiveness of voluntary measures.

ISS's reversal should counsel the SEC that the 2020 rule's issuer engagement requirements are needed now more than ever. Yet the SEC has come to the opposite conclusion. In support of this decision, the SEC notes several other voluntary processes and procedures adopted by some PVABs (while ignoring that, as ISS has done with respect to its draft review service, these offerings could easily be rescinded). For example, the proposing release gives weight to Glass Lewis's Issuer Data Report ("IDR") and Report Feedback Statement ("RFS").[74] However, the IDR service only grants companies access to some of the data underlying Glass Lewis's research, not the full analysis and voting recommendations disseminated to clients—which can only be accessed by purchasing the relevant Glass Lewis Proxy Paper.[75] Similarly, the RFS service is only available to issuers that have paid for a Glass Lewis report.[76]

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[68] *See* Roisman Statement on Proposed Rule, *supra* note 57.

[69] *Dissenting Statement on Proxy Voting Advice Proposal*. Commissioner Hester M. Peirce (17 November 2021). *Available at* https://www.sec.gov/news/statement/peirce-proxy-advice-20211117.

[70] *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.

[71] *Ibid.* ("ISS is altering its approach to providing draft proxy research reports for issuer review in the U.S. and, for shareholder meetings on or after January 1, 2021, will no longer provide draft reports to U.S. companies within the S&P 500 and the U.S. Domestic Issuers within the S&P/TSX Composite Index.")

[72] Proposed Rule, *supra* note 1, at 67387.

[73] *Ibid.* (emphasis added).

[74] *See, e.g., id.* at 67386.

[75] Glass Lewis Issuer Data Report FAQs. *Available at* https://www.glasslewis.com/issuer-data-report/ (accessed 19 December 2021). ("The IDR does not contain Glass Lewis' analysis or voting recommendations, which are solely available by purchase.")

[76] Glass Lewis Report Feedback Statement FAQs. *Available at* https://www.glasslewis.com/report-feedback-statement/ (accessed 19 December 2021). ("Any company, shareholder proponent, dissident shareholder or party to

Put simply, these offerings do not approximate and are not a substitute for the 2020 rule's issuer engagement requirements. Furthermore, as acknowledged by the proposing release, they were already "in place *and considered by the Commission*" when the SEC adopted the 2020 rule.[77] The proposing release fails to explain why the existence of these services did not preclude the SEC from adopting targeted issuer engagement reforms in 2020 but now, with no new evidence other than ISS's *reduction* in issuer outreach, they are held up as an appropriate justification for rescinding that rule's protections.[78] In the NAM's view, these voluntary, limited practices, often offered at a cost to issuers, are in no way a substitute for appropriate regulation.[79]

The proposing release also highlights the Best Practice Principles Group ("BPPG"), which was formed in 2013 (well in advance of the 2020 rule) by six leading PVABs, including ISS and Glass Lewis.[80] In July 2021, the BPPG released its first annual report, finding that each of the six member firms had appropriately adhered to the Group's principles.[81] Putting aside the obvious conflict inherent in the six firms setting their own standards and then declaring themselves to be in compliance with them, it is notable that issuer engagement is nowhere to be found among the Group's principles. BPPG members are encouraged to "disclose a policy (or policies) for dialogue with issuers,"[82] but the Group is notably silent on what those policies should look like or what type of dialogue would be appropriate. The NAM does not believe the existence of a private-sector, voluntary framework that is largely silent on issuer engagement is an appropriate justification for the SEC's decision to rescind the 2020 rule's issuer engagement provisions.

The NAM does not believe that the efforts of the BPPG nor those of individual PVABs are sufficient to protect investors and adequately ensure the accuracy and reliability of proxy voting advice. The SEC in 2020 determined that targeted, principles-based regulatory intervention was appropriate to address years of proxy firms' unwillingness to accept feedback from issuers and companies' inability to communicate effectively with investors about proxy firm mistakes and misleading statements. The proposing release does not provide a sufficient justification for rescinding these important reforms—and in fact ignores key evidence, like the withdrawal of ISS's draft review process, that underscores the need for the 2020 rule. The NAM respectfully encourages the SEC not to outsource its regulatory responsibilities to the BPPG nor to over-rely on PVABs' voluntary practices, but rather to maintain the 2020 rule and take steps to fully implement its critical issuer engagement provisions.

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an M&A transaction who purchases a specific Glass Lewis report will automatically have the right to submit an RFS at no extra cost.")

[77] Proposed Rule, *supra* note 1, at 67388 (emphasis added).

[78] *See, e.g., Fox Television Stations*, *supra* note 63, 556 U.S. 516 ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay…the prior policy.").

[79] It is notable, however, that PVABs are not concerned with the "independence" of their reports when they are offered to issuers for a fee. Though the PVABs' existing practices are not a substitute for the 2020 rule's regulatory requirements, they are similar enough in some respects to make clear that concerns about PVABs' independence are unfounded.

[80] *See, e.g.,* Proposed Rule, *supra* note 1, at 67386.

[81] *Annual Report 2021*. Independent Oversight Committee, Best Practice Principles for Providers of Shareholder Voting Research & Analysis (1 July 2021). *Available at* https://bppgrp.info/wp-content/uploads/2021/07/2021-AR-Independent-Oversight-Committee-for-The-BPP-Group-1.pdf.

[82] *Id.* at 34.

D. Manufacturers have already begun to rely on the regulatory clarity provided by the 2020 rule.

The proposing release solicits comment on companies' reliance on the SEC's adoption of the 2020 rule's issuer engagement provisions.[83] As a matter of first course, the NAM would note that the SEC's unlawful actions in June undermined potential reliance interests by preemptively suspending PVABs' obligations to comply with the issuer engagement requirements. To the extent the Commission is considering a lack of reliance interests as a basis for rescinding the 2020 reforms, we note that an agency suspending enforcement of a rule and then citing a lack of reliance on the rule *because of the agency's own actions* is hardly a compelling basis for revocation—and certainly a less compelling reason to act than the issues surfaced during the decade-long engagement process that informed the need to undertake the rulemaking in the first place.

Nevertheless, the NAM expects that companies have indeed begun to prepare for a proxy process bolstered by a higher degree of engagement among proxy firms, issuers, and investors. The 2020 rule envisages a system where every public company on which PVABs make recommendations has access to those recommendations at the same time as their investors. Such a system does not currently exist, so companies will need to decide on internal processes to receive and analyze PVAB recommendations as soon as possible during a busy proxy season. Similarly, companies must be prepared to quickly draft responses to any recommendations where they feel additional information would be helpful to investors, inform PVABs of their responses, and prepare to answer shareholder inquiries once investors have been notified of any responses by the PVABs. These measures take time and resources to design and implement.

The 2020 rule set a compliance date of December 1, 2021, for its issuer engagement provisions in large part to give market participants—including public companies—time to build out these necessary processes and procedures. The 2021 proxy season, which was supposed to be the final season under the status quo, would have been characterized by retrospective examinations of businesses' current practices to engage with and respond to both proxy firms and investors, as well as analyses of areas where changes were necessary in preparation for the 2020 rule to take effect in advance of 2022. The rest of 2021, notwithstanding the SEC's non-enforcement position, provided companies with an opportunity to implement new strategies, set new standards, and institute the needed procedures for the 2022 proxy season.

Regulatory uncertainty now abounds given the legal questions surrounding the SEC's unlawful non-enforcement stance, the timing of the proposed rule ahead of the 2022 proxy season, and the status of ISS's challenge to the 2020 rule's legality.[84] In the face of such conflicting pressures, a careful company has little choice but to prepare for the upcoming proxy season in reliance on the lawfully promulgated 2020 rule. The NAM respectfully encourages the SEC to remain mindful of these reliance interests as it considers the proposed recission of key components of the 2020 rule.[85]

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[83] *See* Proposed Rule, *supra* note 1, at 67388.

[84] *See Institutional Shareholder Services, Inc. v. SEC*, No. 1:19-cv-3275-APM (D.D.C.). The NAM sought intervenor status in *ISS v. SEC* to defend the SEC's actions in promulgating the 2020 rule, noting that "the Final Rules and the Proxy Guidance: (I) do not exceed the Commission's statutory authority; (II) are not arbitrary and capricious; and (III) do not violate the First Amendment." *See* Memorandum in Support of Intervenor's Combined Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment at 19.

[85] *See, e.g., DHS v. Regents of Univ. of Cal*., 140 S. Ct. 1891, 1913 (2020) ("It would be arbitrary and capricious to ignore" the "serious reliance interests" implicated "[w]hen an agency changes course.") (quotation marks omitted).

III. The NAM opposes the SEC's efforts to weaken Rule 14a-9's antifraud protections with respect to proxy firms' methodologies, sources of information, and conflicts of interest.

As discussed at length over the last decade, proxy firm errors and misleading statements can have a direct and damaging impact on issuers and investors alike. The NAM appreciated that the 2020 rule codified that the provision of proxy voting advice generally constitutes a solicitation, officially bringing proxy firms under SEC oversight and, importantly, subjecting them to antifraud liability under Rule 14a-9.

In brief, Rule 14a-9 "prohibits any proxy solicitation from containing false or misleading statements with respect to any material fact at the time and in the light of the circumstances under which the statements are made."[86] It also prohibits solicitations from "omit[ting] to state any material fact necessary in order to make the statements therein not false or misleading."[87] Notably, though Rule 14a-2(b) exempts proxy firms from the federal proxy rules' information and filing requirements, all soliciting entities are subject to the Rule 14a-9 antifraud standards.

It is critically important that proxy firms, like all soliciting entities, be subject to Rule 14a-9—and the NAM supported the 2020 rule's clarification to that effect. The NAM is disappointed that the proposed rule would weaken the application of Rule 14a-9 to proxy voting advice and that the SEC may be considering special exemptions from Rule 14a-9 for proxy firms. The NAM strongly supports maintaining in full the 2020 rule's reforms to Rule 14a-9, including the addition of paragraph (e) to the Note to Rule 14a-9, and opposes any efforts to undermine the proxy rules' antifraud standards.

A. The NAM supported the 2020 rule's clarification that proxy voting advice is subject to Rule 14a-9 liability and paragraph (e)'s explicit references to potentially misleading statements by proxy firms.

The NAM supported the 2020 rule's clarification that PVABs' solicitations may not contain statements that are "false or misleading with respect to any material fact"[88] and its explicit acknowledgement that "proxy voting advice is subject to Rule 14a-9."[89] We also appreciated the addition of paragraph (e) to the Note to Rule 14a-9, which provides "illustrative" examples of "potentially misleading disclosure" on the part of PVABs, including any failures to disclose material information about their "methodology, sources of information, or conflicts of interest."[90]

In response to the 2019 proposal, which included a similar (though slightly more expansive[91]) provision, the NAM said that we "agree[d] with the proposing release that 'subjecting proxy voting advice businesses to the same antifraud standard as registrants and other persons engaged in soliciting activities is appropriate in the public interest and for the protection of investors'" and that we "appreciate[d] that the proposed rule would provide helpful guidelines to proxy advisory firms,

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[86] 2020 Final Rule, *supra* note 2, at 55118.

[87] *Ibid.*

[88] *Id.* at 55121.

[89] *Ibid.*

[90] *Ibid.*

[91] The 2019 proposal also would have included in paragraph (e) an acknowledgement that a PVAB's "failure to disclose the use of standards or requirements that materially differ from relevant standards or requirements that the Commission sets or approves" could be misleading under Rule 14a-9. *See* 2019 Proposed Amendments, *supra* note 3, at 66538. The NAM supported this clarification given that "a proxy firm presenting its guidelines as a substitute for SEC requirements without clearly conveying the differences between the two raises the significant likelihood of investor confusion." *See* NAM Comments on 2019 Proposed Amendments, *supra* note 4, at 19.

clarifying what information they may need to disclose in order to avoid violating the antifraud rules."[92] We continue to believe that the clarifications related to PVABs' methodologies, sources of information, and conflicts of interest "will provide useful data to the market, and further improve the quality of information available to investors relying upon proxy voting advice to shape their vote decisions."[93] The NAM strongly supports maintaining paragraph (e) in the Note to Rule 14a-9.

B. The NAM does not believe that stakeholders' "concerns" justify the proposed rule's amendments to Rule 14a-9.

The NAM is concerned that the SEC has proposed to delete paragraph (e) and thus its illustrative examples of potential areas in which PVAB solicitations might include false or misleading information. While we appreciate that the proposing release states that a PVAB still may be "subject to liability under Rule 14a-9 for a materially misleading statement or omission of fact*, including with regard to its methodology, sources of information or conflicts of interest*,"[94] we oppose deleting paragraph (e). Explicit references to the potentially misleading nature of PVABs' methodologies, sources of information, and conflicts of interest in the text of the Note to Rule 14a-9 are critical to ensuring that Rule 14a-9 fully and fairly applies to PVABs and that they are held to comparable antifraud standards as other soliciting entities.

As with the issuer engagement provisions, the proposing release notes that some stakeholders "continue to express concerns" about the Rule 14a-9 amendments.[95] Specifically, these market participants are apparently worried that the 2020 rule "may extend liability [under Rule 14a-9] to mere differences of opinion regarding the proxy voting."[96] They also suggest that a PVAB could be held liable "solely because it declined to accept a registrant's suggested revisions or corrections to its proxy voting advice."[97] In our view, these concerns are unfounded. The 2020 rule is explicit that differences of opinion, with issuers or otherwise, would not expose PVABs to liability under Rule 14a-9. And the rule does not offer a mechanism by which issuers could offer "revisions or corrections" that could generate theoretical liability. The rule is similarly clear that the 2020 rule does not create any new cause of action nor expand Rule 14a-9 beyond its traditional emphasis on materially false or misleading statements. To wit:

> *"The amendment to Rule 14a-9 does not broaden the concept of materiality or create a new cause of action, as some have suggested."*[98]
>
> *"The amendment also does not make 'mere differences of opinion' actionable under Rule 14a-9."*[99]
>
> *"The examples are illustrative only, and are not intended to be exhaustive or absolute, or supersede the materiality principle or the facts and circumstances analysis required in each particular case."*[100]

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[92] NAM Comments on 2019 Proposed Amendments, *supra* note 4, at 18 (quoting 2019 Proposed Amendments, *supra* note 3, at 66537).

[93] *Ibid.*

[94] Proposed Rule, *supra* note 1, at 67390 (emphasis added).

[95] *Id.* at 37389.

[96] *Ibid.*

[97] *Ibid.*

[98] 2020 Final Rule, *supra* note 2, at 55121.

[99] *Ibid.*

[100] *Ibid.*

Moreover, the 2021 proposing release acknowledges that the 2020 rule was clear in this regard, noting that "the Commission stated that the 2020 Final Rules were not intended to change the application or scope of Rule 14a-9 or create a new cause of action against PVABs"[101] and that "the amendments do "not make 'mere differences of opinion' actionable under Rule 14a-9.""[102] Yet the proposed rule would nonetheless rescind the 2020 provision based on concerns the 2020 rule explicitly addresses. It is difficult to understand why these concerns would influence the SEC's decision-making when they have been explicitly and repeatedly accounted for.

C. The NAM is concerned about the impact of weakening Rule 14a-9 and potential efforts to exempt proxy firms from antifraud liability altogether.

It is unclear what effect the SEC expects the proposed amendment to have. This uncertainty derives from the fact that the proposing release acknowledges that stakeholders' concerns were obviated by the 2020 rule yet still takes steps to undercut the antifraud rules' application to PVABs; it also re-states the effectiveness of the language of paragraph (e) while at the same time striking it from the Note to Rule 14a-9. In the face of this confusion, the NAM can only assume that the practical implication of the proposed recission of paragraph (e) will be that Rule 14a-9 will be weakened with respect to potentially misleading statements made by PVABs. We cannot support reducing the effectiveness of Rule 14a-9 given the impact that PVABs' misleading statements can have on issuers and investors alike.

Additionally, the NAM is extremely concerned that the SEC may be considering exempting PVABs from Rule 14a-9 altogether, providing unique and damaging immunity that would grant special treatment to PVABs as compared to all other soliciting entities. As evidence of this concern, we note that the proposing release solicits comment on whether the SEC should "exempt all or parts of proxy voting advice from Rule 14a-9 liability entirely."[103] The NAM believes it is critical that the proxy solicitation rules generally, and Rule 14a-9 specifically, continue to apply to proxy advisory firms. We oppose any efforts to exempt proxy voting advice, in whole or in part, from Rule 14a-9, and we urge the SEC not to take steps down this dangerous path.

The 2020 rule notes that "[t]he ability of a client of a proxy voting advice business to make voting decisions is affected by the adequacy of the information it uses to formulate such decisions"[104] and that paragraph (e) of the Note to Rule 14a-9 was designed "to help ensure that proxy voting advice businesses' clients are provided with the material information they need to make fully informed decisions."[105] The NAM continues to strongly support this goal. We respectfully encourage the SEC not to delete paragraph (e) from the Note to Rule 14a-9, nor to go any further toward exempting proxy advisory firms from Rule 14a-9's antifraud protections.

* * * *

The 2020 proxy voting advice rule was designed to improve the accuracy, reliability, and transparency of proxy voting advice and to enhance the total mix of information available to investors. The rule's issuer engagement provisions will enhance important dialogue among issuers, investors, and proxy firms, while its antifraud provisions will safeguard shareholders against proxy

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[101] Proposed Rule, *supra* note 1, at 67389.

[102] *Ibid.* (quoting 2020 Final Rule, supra note 2, at 55121).

[103] *Id.* at 67391.

[104] 2020 Final Rule, *supra* note 2, at 55121.

[105] *Ibid.*

firms' false and misleading statements. The NAM supported, and continues to support, the 2020 rule because manufacturers believe strongly in the importance of ensuring that investors have access to timely, accurate information on which to base their proxy votes.

The NAM is deeply disappointed that the SEC has proposed to rescind critical facets of the 2020 rule. Revoking the rule's essential investor protections will preserve a status quo under which companies have minimal opportunities to provide feedback on proxy firm recommendations and proxy votes are cast based on inaccurate or incomplete information. Further, the NAM has serious concerns about the process by which the proposed rule was developed, as the SEC has offered no substantive justification for its proposed changes and has not allowed the 2020 rule to take effect and be fairly evaluated.

The NAM strongly opposes the proposed rule. We respectfully encourage the SEC to reconsider its proposed changes and to allow the 2020 rule to take effect, in full, in advance of the 2022 proxy season. Maintaining the rule's vital reforms will protect investors, enhance transparency, and improve the accuracy and reliability of proxy voting advice.

Sincerely,

Chris Netram
Vice President, Tax and Domestic Economic Policy