NATIONAL ASSOCIATION OF Manufacturers

Testimony of

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Good morning Chairman Allen, Ranking Member DeSaulnier, and members of the Subcommittee on Health, Employment, Labor, and Pensions. My name is Charles Crain, and I am the Managing Vice President of Policy at the National Association of Manufacturers.

On behalf of the NAM's 14,000 members and the 13 million people who make things in America, I appreciate the opportunity to testify before you today on ensuring that participants and beneficiaries of retirement plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA") receive their full pension benefits without having their savings jeopardized by intermediaries with political or social agendas.

Approximately 85% of manufacturing workers have access to a workplace retirement plan through their employer.[1] These employees depend on sound investment decisions made on their behalf for a secure retirement.

For years, the NAM has advocated for fiduciary responsibility in managing ERISA-regulated retirement plans, emphasizing that investment decisions should prioritize financial returns over non-financial considerations. Pension plan participants and beneficiaries should be able to trust that their long-term savings will be protected so that they can enjoy a stable and secure retirement. Retirement savings should not be influenced by environmental, social, and governance ("ESG") factors unless they have a direct financial impact on plan performance, nor should decisions impacting retirement security be outsourced to unaccountable actors, such as proxy advisory firms, that lack fiduciary obligations to plan participants and beneficiaries.

The sole duty of ERISA plan managers making investment decisions on pensioners' behalf is to provide long-term returns that will support workers and their families in their retirement years. In this fiduciary context, investing based on ESG factors raises significant concerns—and carries the risk that hard-working Americans could see their retirement funds diverted in service of a plan manager's social or political goals. While individual investors are free to choose funds that match their ESG

[1] *National Compensation Survey: Employee Benefits*. Bureau of Labor Statistics, March 2024. *Available at* https://www.bls.gov/ebs/publications/employee-benefits-in-the-united-states-march-2024.htm.

values, ERISA fiduciaries should not select investments based on non-pecuniary ESG factors when plan participants' retirement savings are at stake.

ERISA fiduciaries' obligations to plan participants and beneficiaries extend to decisions about proxy voting as well. ERISA plan managers must remain diligent in exercising the voting rights appurtenant to the shares of stock the plan holds, acting for the "exclusive purpose" of "securing economic benefits for plan participants and beneficiaries."[2] These responsibilities include appropriate oversight of proxy advisory firms and other service providers hired to assist with proxy voting—an important requirement given proxy firms' conflicts of interest and ESG agendas.

During the first Trump Administration, the Department of Labor ("DOL") adopted two rules, which the NAM strongly supported, to address the growing trend of ESG investing by ERISA fiduciaries and their overreliance on proxy firms and other service providers. These regulations—a November 2020 rule on Financial Factors in Selecting Plan Investments[3] and a December 2020 rule on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights[4]—provided clarity to ERISA fiduciaries on how to appropriately incorporate ESG factors into their investment decisions and outlined the due diligence required of fiduciaries when exercising proxy voting rights, including when relying on third-party service providers like proxy firms. The rules' protections were designed to ensure that ERISA fiduciaries continue to act in the best interests of the millions of beneficiaries who depend on workplace retirement plans for a secure retirement.

In our comments on the 2020 rules, the NAM said that the financial factors rule would "ensure that non-pecuniary ESG factors do not put manufacturing workers' retirement savings at risk"[5] and that the proxy voting rule would "ensure that manufacturing workers depending on their pensions for a secure retirement are protected when their plan managers are considering proxy votes."[6]

The NAM continues to support these important goals, and manufacturers were disappointed when the DOL during the Biden Administration rescinded several critical protections from the 2020 rules.[7] Congress now has the opportunity to support the retirement security of millions of Americans who depend on ERISA-regulated plans by instituting appropriate guardrails for ERISA plan managers when it comes to investment choices and proxy voting.

I. ERISA plans should not subordinate financial returns to achieve ESG goals.

As the Trump Administration's financial factors rule noted in 2020, "ESG investing raises heightened concerns under ERISA."[8] Many ESG-focused funds have a stated goal of subordinating investor return or increasing investor risk for the purpose of achieving political or social objectives. These

[2] *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*, 85 Fed. Reg. 55219 (4 September 2020). RIN 1210-AB91, *available at* https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19472.pdf.

[3] *Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. 72846 (13 November 2020). RIN 1210-AB95, *available at* https://www.govinfo.gov/content/pkg/FR-2020-11-13/pdf/2020-24515.pdf.

[4] *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*, 85 Fed. Reg. 81658 (16 December 2020). RIN 1210-AB91, *available at* https://www.govinfo.gov/content/pkg/FR-2020-12-16/pdf/2020-27465.pdf.

[5] NAM Comments on RIN 1210-AB95 (30 July 2020), *available at* https://documents.nam.org/tax/namesgcomments.pdf.

[6] NAM Comments on RIN 1210-AB91 (5 October 2020), *available at* https://documents.nam.org/tax/namdolproxycomments.pdf.

[7] *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 87 Fed. Reg. 73822 (1 December 2022). RIN 1210-AC03, *available at* https://www.govinfo.gov/content/pkg/FR-2022-12-01/pdf/2022-25783.pdf.

[8] 2020 Financial Factors Rule, supra note 3, at 72848.

funds also often assess higher management fees. ERISA requires that fiduciaries, on the other hand, act with a "single-minded focus" on beneficiaries' long-term best interests.[9] These two priorities—pursuing a social or political agenda (often at higher cost) versus bolstering retirement security—are in many instances orthogonally opposed to one another, as evinced by many ESG funds' disclosures highlighting the potential for reduced returns, increased risks, and heightened fees in service of social goals.

Moreover, the social or political values in question are those of the plan manager rather than the views of any particular plan participant, or the participants as a whole. ESG investing decisions in the ERISA context involve the prioritization of plan managers' political goals over the views of plan participants that may or may not hold the same values, as well as the subordination of the participants' retirement savings in service of political pursuits. As such, ERISA fiduciaries should forgo ESG considerations that are not material to the investment in question (or, in fact, any immaterial considerations), when contemplating investment decisions. Instead, fiduciaries should conduct an analysis "focused solely on economic considerations that have a material effect on the risk and return of an investment."[10]

The 2020 rule finalized during President Trump's first term confirmed that "ERISA fiduciaries must evaluate investments and investment courses of action based solely on pecuniary factors," which the rule defines as "financial considerations that have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and funding policy."[11] This standard protects ERISA plan participants and beneficiaries by ensuring that their retirement security—and any pecuniary factors that might impact it—guide the investment decisions made by the plan.

Unfortunately, the Biden Administration rescinded critical portions of the Trump Administration's rule in 2022, including the pecuniary factors standard. In addition to removing the language around pecuniary factors, the Biden rule added language telling fiduciaries that risk and return factors relevant to an investment choice "may include the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action."[12] While it is undoubtedly true that certain climate or ESG factors may be material to a given investment, inserting climate- and ESG-specific language directly into the text of the rule defining ERISA fiduciaries' obligations to plan participants and beneficiaries—especially in place of the previous language that focused fiduciaries on pecuniary factors that influence a plan's financial returns—raised significant concerns.

In our December 2021 comment letter in response to the Biden Administration's proposed rescission, the NAM opposed the DOL's departure from the Trump Administration's focus on pecuniary factors, expressing our concern that the change would "prioritize ESG investing strategies over the retirement security of pension plan participants and beneficiaries."[13]

Under ERISA, fiduciaries must act solely based on participants' and beneficiaries' long-term best interests. Although, as noted, protecting these long-term best interests may well include consideration of ESG factors, many ESG-focused funds prioritize social or political objectives over

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[9] *Ibid*.

[10] *Ibid.*

[11] *Id.* at 72581.

[12] 2022 Rescission Rule, *supra* note 7, at 73827.

[13] NAM Comments on RIN 1210-AC03 (13 December 2021), *available at* https://documents.nam.org/tax/nam_dol_esg_proxy_comments.pdf.

investor returns. In such instances, using ERISA plan investments to pursue an ESG fund's social goals increases costs to plan participants and puts their retirement security at risk.

Fortunately, the new leadership at the DOL is considering rescinding the Biden Administration's rescission rule.[14] Manufacturers strongly support efforts by Congress and by the DOL to ensure that ERISA fiduciaries' investment choices are based solely on pecuniary factors that help bolster retirement security for manufacturing workers across the country.

II. Proxy advisory firms have significant conflicts of interest and make voting recommendations based on their own normative views about public company governance. ERISA plans should not outsource proxy voting decisions to these firms without appropriate oversight.

Proxy advisory firms set corporate governance standards for publicly traded companies, and they provide voting recommendations based on those standards to institutional investors—including managers of ERISA plans—who vote at public companies' annual meetings. Proxy firms have substantive beliefs and normative agendas about how public companies should be run. In other words, they are not disinterested third parties; rather, they seek to guide corporate behavior to align with their own interests. Further, proxy firms do not have a fiduciary duty to ERISA plan participants and beneficiaries, so they are free to exert their outsized influence as they see fit. They do so by recommending that ERISA plans and other institutional investors vote in accordance with their pre-set, one-size-fits-all voting guidelines.

Proxy firm "recommendations" are no mere suggestions, however. Rather, fiduciaries managing ERISA plans—who *do* have a fiduciary duty to the plan participants whose retirement security they are charged with protecting—often vote in lockstep with the proxy firms' recommendations, and in many cases the proxy firms actually cast votes on institutions' behalf via their automated "robo-voting" services.

This gives ISS and Glass Lewis—the two major proxy firms, which together control over 97% of the U.S. proxy advice market—tremendous influence. The firms have historically exercised their influence on traditional corporate governance matters. ISS, for instance, can affect support for a dissident slate of board nominees by 73% and support for an uncontested director by 18%.[15] In recent years, however, proxy firms have increasingly adopted prescriptive policies and provided recommendations on a wide range of environmental and social topics, which may or may not be relevant to an individual company's growth and the value it creates for shareholders. Studies have shown that proxy firms are overwhelmingly supportive of activists' ESG proposals; for example, ISS recommended in favor of nearly 80% of environmental and social proposals during the 2023 proxy season.[16] A 2022 NAM survey found that that nearly 78% of publicly traded manufacturers were concerned that this increased pressure on ESG topics from proxy firms and other third parties will "increase costs for public companies, divert management and board time and resources, and endanger long-term value creation."[17]

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[14] *See, e.g.,* "DOL Reconsidering Biden-Era ESG Considerations Rule," *Plan Adviser* (24 April 2025), *available at* https://www.planadviser.com/dol-reconsidering-biden-era-esg-considerations-rule/.

[15] Larcker, David F., Brian Tayan and James R. Copland, *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry* (14 June 2018). Harvard Law School Forum on Corporate Governance. *Available at* https://corpgov.law.harvard.edu/2018/06/14/the-big-thumb-on-the-scale-an-overview-of-the-proxy-advisory-industry/.

[16] *Voting Matters 2023* (11 January 2024). ShareAction. *Available at* https://cdn2.assets-servd.host/shareaction-api/production/resources/reports/ShareAction_Voting-Matters_2023_2024-06-25-145106_jwpq.pdf.

[17] NAM Manufacturers' Outlook Survey, Fourth Quarter 2022 (4 January 2023). *Available at* https://www.nam.org/wp-content/uploads/2023/01/Manufacturers_Fourth_Quarter_Outlook_Survey_December_2022.pdf.

Beyond their prescriptive agendas, both major proxy firms also exhibit glaring conflicts of interest. ISS operates a corporate consulting service that helps public companies design their equity plans and compensation practices in order to obtain positive recommendations from ISS's institutional voting team. ISS deliberately keeps some aspects of its guidelines on equity plans and executive compensation opaque so that companies have little choice but to subscribe to ISS's consulting service if they want to ensure positive recommendations. Illustrating this obvious conflict, ISS's consulting service has been known to point to negative recommendations and/or shareholder votes against a board-endorsed position (often driven by a negative recommendation) on a previous year's proxy ballot as evidence that its services are needed. Glass Lewis, meanwhile, offers a stewardship service that provides engagement advice to activists who are trying to influence corporate practices via shareholder proposals and other campaigns, which Glass Lewis's institutional research team will later provide recommendations on.

During the first Trump Administration, the DOL's proxy voting rule prohibited an ERISA fiduciary from "following the recommendations of a proxy advisory firm or other service provider without a determination that such firm or service provider's proxy voting guidelines are consistent with the fiduciary's obligations."[18] The rule also required fiduciaries to exercise "prudence and diligence in the selection and monitoring" of proxy firms and other service providers.[19] These important reforms underscored ERISA plan managers' fiduciary obligations and ultimately were designed to protect participants and beneficiaries from proxy firms' conflicts and one-size-fits-all governance agendas, which could impact their retirement security if not properly overseen. At the time, the NAM said that the rule was "a welcome acknowledgement of [proxy] firms' outsized influence on proxy vote decisions and of fiduciaries' obligation to oversee and account for them."[20]

The rule also made clear that ERISA fiduciaries have obligations to act in the best interests of plan participants and beneficiaries in all aspects of proxy voting, not just with respect to proxy firms. Throughout their exercise of shareholder voting rights, the rule requires fiduciaries to: A.) act solely for the economic benefit of the plan, B.) consider any costs involved, C.) not subordinate the interests of the plan to non-pecuniary goals, D.) evaluate the material facts that form the basis for any particular proxy vote, E.) maintain records on proxy voting activities, and F.) as mentioned, exercise appropriate due diligence in selecting and monitoring proxy advisory firms or other proxy service providers. These steps are a crucial framework to ensure that everyday Americans' retirement security is protected when ERISA fiduciaries are casting proxy votes on their behalf.

Additionally, the rule made clear that fiduciaries are not required to vote every proxy—but rather are required to subject decisions about *whether* to vote to the same due diligence as decisions about *how* to vote. This clarification was crucial because, by limiting the number of proxy votes that ERISA fiduciaries felt obligated to cast, it both reduced the costs of exercising shareholder voting authority and made it less likely that ERISA plans would need to rely on proxy firms.

Unfortunately, the Biden Administration's 2022 rescission rule weakened key aspects of the 2020 proxy voting rule, including with respect to fiduciaries' obligations to monitor the activities of proxy advisory firms. It also completely eliminated the clarification that ERISA fiduciaries are not required to vote every proxy and rescinded two safe harbors that would have allowed plans to reduce costs by responsibly abstaining from certain votes that are unlikely to have an impact on the value of an investment or on the outcome of the vote. Taken together, these changes have the effect of empowering proxy firms at the expense of ERISA beneficiaries and plan participants.

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[18] 2020 Proxy Voting Rule, *supra* note 2, at 81695.

[19] *Id.* at 81694.

[20] NAM Comments on RIN 1210-AB91, *supra* note 6, at 1.

For many ERISA plans, the costs of voting each year on hundreds (or, in some cases, thousands) of proxy ballot items at the plan's portfolio companies (especially on shareholder resolutions that seek to advance narrow social or political objectives that are not material to a specific company) far outweigh the direct economic benefits to the plan and its participants and beneficiaries. Very few ERISA fiduciaries have the in-house expertise or staff resources to analyze such a wide range of ballot topics, so requiring them to cast every possible vote is effectively a requirement that they hire a proxy advisory firm. In other words, by mandating that ERISA plans to resume voting on every proxy ballot item, the DOL's 2022 rescission rule essentially forced ERISA fiduciaries to outsource their voting responsibilities, which further entrenches the significant influence of proxy firms.

As noted, the DOL in the early days of President Trump's second term has already made clear that it is reviewing the 2022 Biden rescission rule. Manufacturers continue to support efforts by Congress and the DOL to ensure that ERISA fiduciaries are acting in plan participants' best interests when casting proxy votes, and are exercising appropriate oversight of proxy firms. Policymakers must take these important steps to avoid risks to American workers' retirement savings.

III. Manufacturers support the Protecting Prudent Investment of Retirement Savings Act.

The NAM strongly supports the Protecting Prudent Investment of Retirement Savings Act, sponsored by Chairman Allen, which would codify the DOL's carefully crafted 2020 rules on financial factors and proxy voting. The bill would provide much-needed clarity to ERISA plan managers about the prudent consideration of ESG factors in investing decisions and their obligations with respect to proxy voting. The shifting regulatory views at the DOL on these ERISA investing rules over the past decade has caused significant confusion for plan managers while undermining the soundness of American workers' retirement plans. Chairman Allen's bill would both put an end to this uncertainty and make clear that ERISA plan participants' retirement security must be prioritized over any political or social agendas.

In particular, manufacturers welcome the bill's directive that ERISA fiduciaries select investments "based solely on pecuniary factors." This requirement will, as the bill notes, ensure that fiduciaries do not "subordinate the interests of the participants and beneficiaries" in their plan, nor "sacrifice investment return or take on additional investment risk" as a result of non-pecuniary investing criteria or goals.

Manufacturers also support the bill's provision that fiduciaries must act "prudently and solely in the interests" of plan participants and beneficiaries when voting proxies or exercising other shareholder rights. This overarching requirement will ensure that Americans' retirement security guides fiduciaries' proxy voting decisions, including whether to vote, how to vote, and how to choose and monitor service providers like proxy firms. Manufacturers also welcome the clarification that an ERISA fiduciary is not required to vote on every ballot item, as well as the safe harbors that will empower fiduciaries to focus time and resources on only those ballot items that are most relevant to the plan's financial performance. Similarly, manufacturers support the list of factors outlined in the bill (economic interest, costs, and material facts) that a plan fiduciary would be required to consider when deciding whether or how to vote or to exercise another shareholder right.

Given manufacturers' long-standing concerns about the pervasive influence and the business practices of the major proxy advisory firms, the NAM strongly supports the bill's requirements that ERISA fiduciaries "exercise prudence and diligence in the selection and monitoring" of these firms and "prudently monitor" the firm's proxy voting activities in order to ensure that they are acting "prudently and solely in the interests of plan participants and beneficiaries." In complying with these requirements, we believe that most ERISA fiduciaries would best serve their plan participants and beneficiaries by: A.) taking a far more selective approach to proxy voting, allowing the plan to abstain (or not vote at all) on immaterial ballot items; B.) generally voting in line with the recommendations of a company's independent board of directors (which has its own fiduciary duties to shareholders), unless the plan fiduciary has material concerns about the company that the board or management team have failed to address; and C.) refraining from using the "robo-voting" services offered by proxy firms if a vote is contested or otherwise non-routine.

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On behalf of the NAM and the 13 million people who make things in America, I appreciate the opportunity to testify before the Subcommittee today. The NAM stands ready to work with Congress to ensure that the millions of manufacturing employees who participate in workplace retirement plans will have a secure retirement.