*Testimony of*

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**Subcommittee on the Administrative State, Regulatory Reform, and Antitrust**

*Hearing on*

**"The Proxy Advisor Duopoly's Anticompetitive Conduct"**

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Good morning Chairman Fitzgerald, Ranking Member Nadler, and members of the Subcommittee on Administrative State, Regulatory Reform, and Antitrust. My name is Charles Crain, and I am the Managing Vice President of Policy at the National Association of Manufacturers. On behalf of the 13 million people who make things in America, I appreciate the opportunity to testify before you today to illustrate the impact that the anti-competitive practices of the proxy firm duopoly has on publicly traded manufacturers of all sizes—and to make the case for urgent action by Congress and the Securities and Exchange Commission to rein in these powerful market actors.

The two major U.S. proxy firms—ISS and Glass Lewis—set corporate governance standards for public companies, and they provide voting recommendations based on those standards to institutional investors who engage in proxy voting of their shares at 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, while further entrenching their dominant market positions. Indeed, proxy firms have policies and provide recommendations on a wide range of ESG 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.

In addition, proxy firms do not have a fiduciary duty to the underlying investors in America's public companies—teachers, firefighters, and manufacturing workers saving for a secure retirement—so they are free to exert their outsized influence as they see fit. They do so by recommending that institutional investors vote in accordance with their pre-set, one-size-fits-all voting guidelines.

Proxy firm "recommendations" are no mere suggestions, however. Many mid-size and smaller institutional investors—who *do* have a fiduciary duty to the Main Street investors whose assets they manage—vote in lockstep with the two proxy firms' recommendations, and in many cases the proxy firms actually cast votes on institutions' behalf via their automated "robo-voting" services. This degree of influence over companies' proxy voting results means that ISS and Glass Lewis—which together control more than 90% of the U.S. proxy advice market—effectively dictate corporate governance policies for America's capital markets.

Powerful market actors with this degree of influence should clearly be subject to appropriate government oversight. But in the case of proxy firms, the case for regulatory guardrails is even stronger. Their consulting services, which many companies feel compelled to subscribe to, present an obvious conflict of interest. Their inflexible voting policies do not account for the individual circumstances of disparate companies and their investors, and they are developed with minimal transparency or corporate input. And proxy firms have been reluctant to engage with companies to correct errors, reconsider misleading assumptions, or re-examine how their recommendations might impact the business in question. Yet, despite years of effort by both Congress and the SEC, proxy firms remain stubbornly unregulated.

Additionally, the proxy firms' business practices raises a series of antitrust concerns that should be addressed by Congress and regulators. In short, the firms use their dominant market positions—namely, their one-size-fits-all policies and their robo-voting platforms—to exercise undue influence over proxy voting outcomes, consolidate power, and drive revenue toward their consulting services.

- For example, the complexity and opacity of their corporate governance standards increase institutional investors' reliance on the firms and, subsequently, necessitate companies' reliance on their consulting services. Indeed, some of the firms' policies appear designed specifically to increase their own power—such as their standard requiring companies to hold Say on Pay votes annually when Congress expressly set the minimum frequency at every three years, or their practice of setting vote thresholds for shareholder support that are impossible to meet without a positive proxy firm recommendation.
- Similarly, the firms' voting platforms drastically improve the logistics of proxy voting for institutional investors—a market position the firms use to sell their vote recommendation services, which allow their preferred vote outcomes to be pre-populated within the voting platform and often robo-voted on investors' behalf.

These practices have created a feedback loop that has given the firms outsized influence over voting decisions, which often exceeds that of a company's largest investors. This allows ISS and Glass Lewis to dictate the corporate governance practices of U.S. companies—which makes it all the more important for companies to pay thousands of dollars for the proxy firms' consulting services. Publicly traded manufacturers and their investors have for years experienced the impact of this pervasive duopoly.

## I. Antitrust Concerns Posed by the Two Dominant Proxy Firms

### *A. The Origins of the Proxy Firm Duopoly*

The current U.S. proxy advice duopoly was fostered by a series of regulatory changes that incentivized investment managers and other institutional investors to hire proxy advisors. In 1988, the Department of Labor issued its Avon opinion letter, which advised fund managers that their fiduciary duty to manage retirement plan assets included the responsibility for proxy voting. In 2003, the SEC required mutual fund managers to start disclosing their proxy voting records annually through Form N-PX. The Commission also adopted Rule 206(4)-6,[1] which directed investment advisers to adopt written policies and procedures reasonably designed to ensure that they voted

[1] Final Rule, *Proxy Voting by Investment Advisers*, 17 CFR Part 275 (31 January 2003). *Available at* https://www.sec.gov/rules-regulations/2003/01/proxy-voting-investment-advisers#P49_6200.

proxies in their clients' best interests.[2] In the rule's adopting release, the SEC provided guidance on avoiding potential conflicts of interest and stated that investment advisers could demonstrate that they complied with their fiduciary duties if they voted "in accordance with a pre-determined policy, based upon the recommendations of an independent third party."[3]

The Commission also issued a pair of no-action letters to ISS[4] and a smaller proxy firm (Egan-Jones) that clarified that voting in accordance with a proxy advisor's recommendations could protect an investment adviser from liability based on alleged conflicts of interest. The no-action letters and investment advisors' desire to avoid liability and reduce their proxy season workloads drove many fund managers to hire one of the major proxy firms, ISS (which was founded in 1985) and Glass Lewis (founded in 2003). In addition, the significant increase in institutional ownership[5] of U.S. public companies has further contributed to the growth of proxy advisors and bolstered their influence over public companies.

Over time, the two dominant proxy advisors, which were largely bankrolled by private equity funds and foreign investors,[6] consolidated their growing market position by rolling up smaller rivals and related businesses that offered governance ratings and research on accounting risk, cyber risks, sustainability, and "socially responsible" investing. Notable examples of acquisitions of direct competitors include the ISS acquisitions of Proxy Monitor in 2001 and IRRC in 2005 and Glass Lewis's acquisition of the clients of Proxy Governance Inc. in 2010. ISS itself was purchased by RiskMetrics Group in 2007, which later was acquired by MSCI, Inc., and then spun off in 2014 into a separate entity backed by private equity. Today, ISS and Glass Lewis collectively control between 90% and 97%[7] of the U.S. proxy advice market,[8] followed by a handful of smaller competitors, most notably Egan-Jones. While a few new entrants have tried to compete with the dominant proxy firms,

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[2] *See, e.g.,* Andrew F. Tuch, "Proxy Advisor Influence in a Comparative Light," *Boston University Law Review*, Vol. 99:145 (2019); Tamara C. Belinfanti, "The Proxy Advisory and Corporate Governance Industry: The Case for Increased Oversight and Control," *Stanford Journal of Law, Business & Finance* (2009).

[3] While the SEC's intent was to reduce conflicts of interest by investment managers, many have outsourced their proxy voting to the two dominant proxy firms, which themselves are not truly independent and have significant conflicts of interest.

[4] Investment Advisors Act of 1940 - Rule 206(4)-6, Institutional Shareholder Services, Inc. (15 September 2004). *Available at* https://www.sec.gov/divisions/investment/noaction/iss091504.htm.

[5] In the 1970s, individual investors owned about 80% of the shares in U.S. companies, while institutions owned 20%. Today, those ownership positions have roughly reversed, as institutions own about 80% of the shares in large-cap S&P 500 companies. *See, e.g.,* Jan Fitchner, "The Rise of Institutional Investors," *The Routledge International Handbook of Financialization* (2020); *Pensions & Investments*, "80% of equity market cap held by institutions" (25 April 2017).

[6] During their history, the two major proxy firms have been at times owned by entities based in China, the United Kingdom, Canada, and Germany. Glass Lewis, which was previously owned by two Canadian pension funds, is now owned by Toronto-based Peloton Capital Management. ISS is majority owned by Deutsche Borse Group.

[7] A 2009 Stanford law review article estimated that ISS had a 61% share of the proxy advice market, followed by Glass Lewis with a 36% stake, which totaled a combined market share of 97%. Tamara C. Belinfanti, "The Proxy Advisory and Corporate Governance Industry: The Case for Increased Oversight and Control," *Stanford Journal of Law, Business & Finance* (2009). This 97% figure also was cited by a George Mason University Mercatus Center paper by James Glassman and Hester Peirce, "How Proxy Advisory Services Became So Powerful" (18 June 2014), *available at* https://www.mercatus.org/research/policy-briefs/how-proxy-advisory-services-became-so-powerful.

[8] While ISS has questioned the 97% market share estimate, other studies have found comparable results. An analysis of mutual funds' Form N-PX filings in 2021 found that the two proxy giants collectively had a 90% market share. According to this analysis, ISS controlled 48% of the proxy advice market for U.S. mutual funds, with assets totaling $26.8 trillion from 144 fund families, while Glass Lewis had a 42% stake, with $23.6 trillion in assets across 94 fund families. Chong Shu, "The proxy advisory industry: Influencing and being influenced," *Journal of Financial Economics*, Vol. 154, 103810 (April 2024), *available at* https://www.sciencedirect.com/science/article/abs/pii/S0304405X24000333.

those competitors have not been able to gain traction with a sufficient number of institutional clients nor match the incumbent firms' research coverage.

Both ISS and Glass Lewis cover a wide swath of smaller U.S. companies beyond the S&P 500 and also provide research on thousands of companies in non-English-speaking markets that their clients hold shares in. Even if a new research provider were to focus solely on large-cap U.S. issuers, it would be costly and difficult for a startup to fully replicate the back-office proxy vote instruction delivery services that the two major firms have established over the past two decades. The U.S. proxy voting system is extremely convoluted, and there are various intermediaries that stand between companies and their Main Street investors (including brokers, custodial banks, vote tabulators, investment managers, and Broadridge Financial, a firm that maintains investor lists and works on behalf of brokers to transmit proxy materials). Most proxy firm clients (particularly those that manage multiple diversified funds) remain with the same firm for years, in part because of concern that some votes may not get processed correctly after a switch to a rival proxy firm.

### *B. New Regulatory Requirements Helped the Proxy Firms Further Consolidate Their Market Power*

#### 1.) <u>The Firms Have Increased Their Influence by Requiring Supermajority Approval During Non-Binding Shareholder Votes on Compensation</u>

The influence of the proxy advisor duopoly also has been further bolstered by additional regulatory developments, most notably Section 951 of the Dodd-Frank Act of 2010, which required public companies to hold Say on Pay shareholder votes on their executive compensation practices. Although these votes are not binding, the outcome of these votes and the proxy advisors' recommendations during these votes have real consequences and significant costs for public companies.

To ensure that companies pay close attention to their Say on Pay recommendations, both proxy firms have voting policies that call for stricter scrutiny if a company fails to earn supermajority[9] support during those votes. If that happens, ISS "will conduct a qualitative review of the compensation committee's responsiveness to shareholder opposition at the next annual meeting."[10] Likewise, Glass Lewis explains its approach: "When 20% of more of shareholders vote contrary to management . . . , we believe that boards should engage with shareholders on the issue and demonstrate some initial level of responsiveness."[11]

If a board fails to be sufficiently responsive (in view of the proxy firm), then the firm will then advise their clients to vote "no" during the company's next Say on Pay vote or to vote against its compensation committee chair or members. While most boards take notice when there is significant shareholder dissent, directors are well aware that these sub-70% votes on Say or Pay do not happen organically but (in almost every case) are directly attributable to a negative recommendation from one or both of the major proxy firms. Under the proxy firms' self-perpetuating policies, a company can find itself in a multiple-year cycle of escalating negative recommendations until the company can demonstrate that it has addressed all the proxy firms' concerns about the company's

[9] ISS applies a 70% standard, while Glass Lewis has a stricter 80% standard. While some company bylaws (or state law) require supermajority support for approval of a merger or a bylaw change, there is no such requirement for Say on Pay votes on executive compensation, which are advisory.

[10] ISS, U.S. Compensation FAQs, at 8, *available at* https://www.issgovernance.com/file/policy/active/americas/US-Compensation-Policies-FAQ.pdf.

[11] Glass Lewis, 2025 U.S. Benchmark Policy Guidelines at 15, *available at:* https://resources.glasslewis.com/hubfs/2025%20Guidelines/2025%20US%20Benchmark%20Policy%20Guidelines.pdf.

pay practices. Faced with this embarrassing and distracting prospect, many companies opt to increase their outreach to major investors, rework their disclosures, and hire proxy solicitors and governance consultants to boost their Say on Pay support.

ISS, of course, offers consulting services to help companies avoid negative Say on Pay recommendations from its own proxy voting service—often the easiest way to avoid this often-years-long saga.

2.) The Proxy Firms Back Annual Pay Votes to Further Entrench Their Market Positions

When Congress drafted the Say on Pay provisions of the Dodd-Frank Act, lawmakers gave public companies and their shareholders the flexibility to choose the most appropriate frequency (every one, two, or three years) for these votes.[12] Despite Congress's intent to provide company-specific flexibility, both ISS and Glass Lewis have consistently recommended that their clients opt for annual compensation votes at *all companies*.

As a result, annual Say on Pay votes have become the *de facto* market standard in the United States. This is despite the fact that some investors initially expressed a preference for a triennial frequency so they could better manage their busy proxy voting workloads and more thoughtfully analyze each company's pay practices. Notwithstanding these valid concerns, most investors have continued to follow the major proxy advisors' recommendations for an annual Say on Pay frequency, which has further cemented investors' reliance on the services of the proxy firms.

Most institutions with diversified portfolios have little choice but to hire ISS or Glass Lewis to cope with the large volume of annual Say on Pay votes—a clear illustration of the impact of the firms' decision to override Congress and insist on annual votes.

3.) Proxy Firms Have Profited From Listing Standards Requiring Binding Votes on Equity Plans

One of the most significant (but overlooked) regulatory requirements that has bolstered the market power of proxy firms are the NYSE and Nasdaq listing standards that require companies to obtain shareholder approval of equity compensation plans that allow companies to provide stock, options, or other equity-based incentives to officers and their employees.

Depending on the scope of these plans and the number of shares or options remaining, companies may have to seek approval for new or amended equity plans every few years. Companies in certain industries that experience greater share price volatility or rely more heavily on equity compensation, such as biotechnology or technology, have to get new plans approved more frequently. These shareholder votes on equity plans are binding, so companies understandably do not want to risk a plan rejection and then have to either convene a special meeting or temporarily lose their ability to provide new equity incentives to officers and employees.

While the proxy firms provide general guidelines for these plans, they purposely do not publish the complex quantitative methodology and models they use to determine whether to recommend in favor of a company's equity plan.[13] Given the opaque nature of the firms' equity plan models, many

[12] The Dodd-Frank Act requires companies to hold non-binding Say on Frequency votes at least every six years to determine whether the company's Say on Pay votes should be held every one, two, or three years.

[13] For instance, Glass Lewis provides a general explanation of its methodology without disclosing the absolute limits within its model: "Our quantitative analysis assesses the plan's cost and the company's pace of granting utilizing a number of different analyses, comparing the program with absolute limits we believe are key to equity value creation and with a carefully chosen peer group. In general, our model seeks to determine whether the proposed plan is either

companies believe that they have to pay for the firms' equity plan consulting services so they will know whether they need to make adjustments to their draft plans in order to increase their chances of obtaining a positive recommendation from the firms' proxy research analysts.[14] This clear conflict of interest results in companies grudgingly paying thousands of dollars to the proxy firms for the assurance of knowing that their equity plans will pass.

4.) Proxy Firms Have Capitalized on the Record Number of ESG Shareholder Proposals

Since the 2010s, there has been a steady increase in the volume of environmental and social proposals being filed and appearing on corporate proxy ballots. Many of these proposals are filed by shareholders with tiny stakes in a company,[15] and they often deal with highly politicized topics that bear little relevance to the specific company where they are filed.

In 2020, the SEC tried to stem this tide of special-interest ESG proposals by raising the resubmission thresholds for resolutions that do not attract wide support. However, the Commission issued a staff legal bulletin in 2021, called SLB 14L, that opened the flood gates to an even greater surge of prescriptive shareholder proposals on environmental, social, and political topics. In both 2022 and 2023, activists filed a record number of proposals at U.S. companies—more than 800 each year. Some well-known companies were hit with more than a dozen resolutions, including multiple proposals on climate-related topics as well as competing social issue proposals from both sides of the political aisle.[16] Many institutions were frustrated (and at times overwhelmed) by this additional proxy voting workload, which further cemented their reliance on proxy firms to help them vote on these additional environmental and social proposals.

Fortunately, the SEC under then-Acting Chair Mark Uyeda recently rescinded SLB 14L, but companies still are dealing with an excessive number of special-interest proposals that impose significant costs on companies and other shareholders.[17] Notwithstanding this SEC action, the proxy firms will continue to play a key role in determining which proposals on new environmental and social topics will gain traction and those that will not.

## II. The Firms' Influence Over Proxy Voting Outcomes Has Made Them De Facto Regulators of U.S. Corporate Governance Practices

### *A. Proxy Firms Exercise Outsized Control Over Proxy Voting Outcomes*

At many companies, ISS and Glass Lewis have as much power over proxy voting outcomes as some of their largest shareholders, despite owning no shares in those companies. A growing

absolutely excessive or is more than one standard deviation away from the average plan for the peer group on a range of criteria, including dilution to shareholders and the projected annual cost relative to the company's financial performance. Each of the analyses (and their constituent parts) is weighted and the plan is scored in accordance with that weight." Glass Lewis, 2025 U.S. Benchmark Policy Guidelines at 63.

[14] The risk of a negative recommendation is a real concern for companies that rely on equity incentives. In 2023, ISS recommended against equity plan proposals at 30% of Russell 3000 companies and 13% of S&P 500 companies, up from 26% and 10% in 2022. Corporate Board Member, "Succeeding With Stock Plan Proposals," *available at* https://boardmember.com/succeeding-with-stock-plan-proposals/.

[15] Under SEC rules, a shareholder must hold just $2,000 in a company's shares for at least three years to get their proposal on the company's annual meeting ballot.

[16] According to the Conference Board, activists filed 513 proposals on environmental and social topics in 2023, up from 466 proposals in 2022.

[17] Staff Legal Bulletin 14M (12 February 2025), *available at* https://www.sec.gov/about/shareholder-proposals-staff-legal-bulletin-no-14m-cf.

number of small and medium-sized investment managers are voting in lockstep[18] with the proxy firms' recommendations, and in many cases the proxy firms actually cast votes on behalf of these managers via their automated "robo-voting" services. These technology platforms allow for the pre-population of voting instructions based on a client's general policy preferences; if the client doesn't take action to change those instructions, shares can be voted by the proxy advisor on their behalf.

A study conducted during the SEC's consideration of its 2020 proxy firm rule found that 175 institutions, with more than $5 trillion in assets under management, vote in lock step with proxy firms more than 95% of the time.[19,20] Another study found that ISS can affect support for a dissident slate of board nominees by 73% and support for an uncontested director by 18%.[21] During Say on Pay votes, negative recommendations by the major proxy firms have been correlated with a 17 to 25 percentage point drop in support for management.[22] Given this influence, companies are forced to treat proxy firms as quasi-regulators, adjusting company policies and making disclosures to satisfy the firms in order to avoid negative recommendations on critical corporate matters—and, increasingly, on environmental and social topics outside the realm of traditional corporate governance.

To reduce costs and streamline the proxy recommendation process, both ISS and Glass Lewis have developed one-size-fits-all proxy voting guidelines[23] that they apply to all covered companies in a given market, regardless of industry and market cap. Many of these policies are stricter than exchange listing standards and state corporate law and are often influenced by activists' demands. The firms' beliefs on the "right" way to govern a public company, which in recent years increasingly includes a normative ESG agenda, are embedded in the firms' benchmark guidelines, which are used to build voting recommendations for every proxy vote at every public company. These benchmark policies guarantee that the firms' policy preferences are carried out via the voting power of the trillions of dollars of investor shares held by the institutions that follow ISS and Glass Lewis. While most companies try to be attentive to emerging best practices in governance, many express frustration that the proxy firms appear to keep "moving the goal posts" and further tightening their standards.

Many of these voting policies provide that the proxy firm will recommend "generally for" (or "generally against") depending on the topic of a shareholder proposal, a compensation practice, a takeover defense, or a director-related issue. For instance, both firms have strict numerical limits on the number of outside boards a corporate director may serve on (regardless of the actual workload) and will recommend against incumbent directors based on their attendance at board meetings. The firms' policies also provide for a "case-by-case" approach to a limited number of topics (such as whether to

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[18] While the two proxy firms assert that a majority of their clients vote their shares based on "custom" voting policies, most of those policies closely track the firms' benchmark proxy voting guidelines and reflect the proxy firms' normative views about good governance.

[19] Timothy M. Doyle, *The Realities of Robo-Voting* (9 November 2018), American Council for Capital Formation. *Available at* https://accfcorpgov.org/wp-content/uploads/ACCF-RoboVoting-Report_11_8_FINAL.pdf.

[20] Researcher Chong Shu observed a similar trend, noting that "the proportion of ISS's customers who vote almost exclusively in line with its recommendations has increased from 7 percent in 2007 to 23 percent in 2021." *See* Chong Shu, *supra* note 8.

[21] David F. Larcker, 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/.

[22] *See* Chong Shu, *supra* note 8.

[23] While both firms now conduct annual surveys on their policies and ISS publishes some of its proposed updated policies for public comment, the firms historically have been far more responsive to the views of activists than those of companies. When ISS does seek comment on certain draft policies, the comment period is typically just a few weeks, which is not sufficient time for most companies to analyze the potential impact and share their views.

support a management proposal calling for shareholders to ratify the company's "poison pill" takeover defense), which typically entails a more detailed evaluation of the company's circumstances. That type of discretionary case-by-case analysis is the exception rather than the rule, as it requires more deliberation by the firms' analysts. Nevertheless, most companies believe that the proxy advisors do not adequately consider each company's unique circumstances when making recommendations.

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.[24] 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."

### *B. Proxy Firms Operate With Glaring Conflicts of Interest*

Over the past 22 years, both major firms have developed (or acquired) other businesses beyond the proxy voting research and vote execution/delivery services that they provide to institutional investors. The two firms have used their dominant market position and their influence over proxy voting outcomes to drive clients to their other services, which historically have earned higher profit margins than lower-margin, labor-intensive proxy research. The firms' obvious conflicts of interest harm public companies and Main Street investors—while increasing their own profits and market power.

Most prominently, ISS has for years maintained a profitable[25] corporate consulting arm that provides advice to companies on executive compensation and corporate governance matters. These are the very same topics that are the subject of vote recommendations issued by the firm's proxy research analysts. While ISS has long insisted that the proxy analysts on the institutional side of its business are unaware of which companies are corporate clients, that knowledge is available to ISS senior staff members who are deemed to be above this corporate "firewall." In addition, the ISS corporate consulting staff is well aware of which companies receive negative vote recommendations from the proxy analysts—and have aggressively marketed their advisory services to those issuers. Public companies have repeatedly reported their surprise (and dismay) after being pitched by ISS Corporate Services shortly after receiving a negative recommendation. To many companies, it is clear that ISS is using its dominant market position and influence over voting outcomes to drive more business for its corporate consulting arm.

ISS is not the only firm with such conflicts. Glass Lewis recently started offering its own "Equity Plan Advisory Service**"** to companies. This service "offers tailored support to help you design

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[24] While the proxy giants insist that they are simply implementing the views of their clients and have no stake in proxy voting outcomes, the firms continue to be closely aligned with shareholder activists. For example, both Glass Lewis and ISS have been "affiliate members" of the Interfaith Center on Corporate Responsibility, a coalition of left-leaning religious funds and other activists that file shareholder proposals and engage on ESG issues. In addition, the ISS benchmark policy on board accountability on climate issues mentions that it will apply closer scrutiny to companies that appear on an activist group's list of high emitters of greenhouse gases.

[25] Although ISS's financials are no longer public, the firm's corporate consulting business generated significant revenues when ISS was owned by MSCI. In 2013, MSCI reported that "revenues related to our ISS Corporate Services products and services represented 29.2% of our [ISS] Governance business total revenues." In 2012, corporate services accounted for 25.1% of total ISS governance revenue. *See* MSCI, Form 10-K for the Year Ended December 31, 2013, *available at* 08399e64-25f7-4382-8c6f-eb77f9eed590, and MSCI, Annual Report 2012, *available at* NYSE_MSCI_2012.pdf.

shareholder-friendly equity plans that minimize the risk of disruptions." The firm's website promises companies that they can "make equity plan decisions with confidence, leveraging our data and expertise to position your proposals for stronger shareholder approval."[26] Given this marketing pitch, companies can only assume that approval of their equity plans by Glass Lewis and its clients could be at risk if the company fails to pay for a consulting service.

In another type of conflict, Glass Lewis offers a suite of "stewardship solutions" to investors, including an "active stewardship engagement" offering and "custom engagement services" whereby the firm's stewardship team will engage on behalf of its investor clients to pressure companies on specific issues.[27] The firm's services include "scheduling engagement meetings with companies," a "custom engagement escalation process," and "leading engagement meetings (with optional client participation)." Of course, it is highly foreseeable that some of these Glass Lewis-assisted engagement efforts will prompt clients to file shareholder proposals or wage vote-no campaigns that Glass Lewis's proxy analysts will eventually opine on. In addition, it is hard to imagine that Glass Lewis's proxy analysts would even-handedly assess a company's governance practices if the company was resistant to demands by the firm's stewardship team.

### *C. Proxy Firms Are Resistant to Sharing Draft Reports and Correcting Errors*

In addition to enforcing strict preferences about public company governance, proxy firm reports and recommendations often include errors and misleading statements, ranging from specific incorrect facts to disingenuous assumptions about, for instance, a company's peer group or compensation practices. The prevalence of errors is not unexpected, as the firms publish hundreds of reports on companies each week during the peak of the U.S. proxy season in April and May. Despite this risk of errors, proxy firms have been steadfastly resistant to allowing companies to review their draft recommendations in order to flag mistakes, and they historically have been reluctant to engage in a productive dialogue with companies to correct errors, misunderstandings, or misrepresentations.

Prior to 2021, ISS did offer limited issuer engagement opportunities: it allowed companies in the S&P 500 to review and provide some feedback on its draft voting recommendations. It offered this service "to help check the factual accuracy of the data underpinning [its] research"—a laudable goal, and one which clearly was undermined by ISS's decision to rescind the program following the finalization of the SEC's 2020 proxy firm rule. Glass Lewis, on the other hand, did not offer issuer review prior to the 2020 rule, but after the rule's finalization Glass Lewis launched its Report Feedback Statement program, which allows companies to respond to a Glass Lewis recommendation—if they have paid a fee to access the recommendation in the first place.

The firms' unwillingness to share draft reports with companies, or to correct errors or misunderstandings, degrades the quality of their proxy advice—ultimately resulting in voting decisions being made or corporate policies being set based on inaccurate information. That is why the NAM has long called for proxy firms to provide all public companies a reasonable opportunity to review proxy report drafts and to provide feedback before a report is published and proxy clients' shares start to be voted through the firms' robo-voting platforms.

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[26] The firm's website further promises to help companies "anticipate how institutional investors and Glass Lewis may assess your plan and increase your chances of shareholder approval." *See* Glass Lewis, Equity Compensation Advisory page, *available at* https://www.glasslewis.com/corporate-solutions/equity-compensation-plan-advisory.

[27] *See* Glass Lewis Active Stewardship and Custom Engagement pages, *available at* https://www.glasslewis.com/investor-solutions/active-stewardship-engagement and https://www.glasslewis.com/investor-solutions/custom-engagement-services.

## III. Past Efforts to Regulate Proxy Firms

In 2020, the SEC finalized a long-awaited rule to provide appropriate oversight of proxy advisory firms.[28] This rule, developed over the course of a decade, instituted commonsense safeguards designed to increase transparency into these powerful actors. In particular, the rule required proxy firms to provide copies of their final recommendations to companies and to have a mechanism in place by which investors could become aware if a company submitted a response to the firm's recommendation. It also required proxy firms to disclose their conflicts of interest and clarified that proxy firms are subject to the proxy solicitation rules' antifraud standards. Alongside the final rule, the SEC issued guidance to asset managers outlining instances in which relying on proxy firms' robo-voting services instead of reviewing all information available to them and making an informed voting decision could implicate their fiduciary obligations to Main Street investors.[29]

Notably, the 2020 rule's issuer engagement requirements were significantly less strict than what the SEC had proposed in 2019.[30] The 2019 proposal would have required proxy firms to allow companies to review and provide feedback on their *draft* reports. Proxy firms also would have been required to disseminate company responses to their clients alongside their voting advice. The NAM strongly supported, and continues to support, the draft review and feedback provisions from the 2019 proposal. Indeed, a draft review process for all public companies would represent a significant step toward transparency and accountability for proxy firms, as the opportunity for companies to review draft reports, identify potential mistakes, and respond to any misrepresentations or disagreements before investors start voting would significantly improve the accuracy of proxy voting advice and enhance the amount of relevant information available to investors.

Despite the compromise nature of the 2020 reforms, the SEC in 2021 began to take steps to dismantle this important progress. In a series of coordinated actions in June 2021, then-Chairman Gary Gensler announced that the SEC would "revisit" the 2020 rule,[31] the Division of Corporation Finance suspended enforcement of the rule,[32] and the SEC granted ISS "relief" from the rule's requirements.[33] In a lawsuit brought by the NAM before the U.S. District Court for the Western District of Texas, the court found that, via these coordinated actions, the SEC violated the Administrative Procedure Act by suspending the rule outside the required notice-and-comment process.[34]

In 2022, the SEC finalized a rule unlawfully rescinding critical portions of the 2020 rule—including the compromise requirement that proxy firms share their recommendations with impacted companies after they are finalized and take steps to ensure that investors have access to any

[28] *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.

[29] *See Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers,* 85 Fed. Reg. 55155 (3 September 2020). Release No. IA-5547; *available at* https://www.govinfo.gov/content/pkg/FR-2020-09-03/pdf/2020-16338.pdf.

[30] *See 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.

[31] *Statement on the Application of the Proxy Rules to Proxy Voting Advice*. Chairman Gary Gensler (1 June 2021). *Available at* https://www.sec.gov/news/public-statement/gensler-proxy-2021-06-01.

[32] *Statement on Compliance with the Commission's 2019 Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice and Amended Rules 14a-1(1), 14a-2(b), 14a-9.* SEC Division of Corporation Finance (1 June 2021). *Available at* https://www.sec.gov/news/public-statement/corp-fin-proxy-rules-2021-06-01.

[33] *See* Mtn. for Abeyance, *Institutional Shareholder Services Inc. v. SEC*, No. 19-cv-3275 (D.D.C.).

[34] *Nat'l Ass'n of Mfrs. v. SEC*, 631 F.Supp.3d 423 (W.D. Tex. 2022).

company responses to those recommendations.[35] At the same time, the SEC also rescinded the robo-voting guidance that had been finalized concurrent with the 2020 rule, which cautioned asset managers against outsourcing their voting authority to the firms. Manufacturers strongly opposed these rescissions.[36] The SEC's actions to rescind the 2020 rule were vacated in a lawsuit brought by the NAM before the U.S. Court of Appeals for the Fifth Circuit, which held that the SEC's actions were "facially irrational" and not "reasonable or reasonably explained."[37]

As the Gensler SEC sought to undo the substance of the 2020 rule, the SEC was at least defending in court its authority to provide some degree of oversight of proxy firms. Shortly after the promulgation of the SEC's 2019 guidance clarifying that proxy voting advice generally constitutes a solicitation under the Exchange Act and thus that proxy firms were subject to existing antifraud standards under the proxy solicitation rules, ISS filed suit against the SEC. ISS expanded its lawsuit after the 2020 rule was finalized, seeking to nullify the rule and to undermine the SEC's ability to regulate proxy voting advice at all. During the first Trump Administration and for most of the Biden Administration, the SEC defended its authority before the U.S. District Court for the District of Columbia—and the NAM joined the Commission in that fight as an intervenor-defendant. But after a district court judge ruled in ISS's favor in 2024, the Gensler SEC abandoned its defense of the Commission's regulatory authority.[38]

If ISS's case is successful, it will effectively block any future attempt to regulate proxy advisory firms via the proxy solicitation rules, by any administration. That is why the NAM, as intervenor, has appealed the District Court ruling to the U.S. Court of Appeals for the District of Columbia Circuit—and we remain committed to defending the SEC's ability to provide commonsense oversight of these powerful actors. On May 2, the D.C. Circuit heard oral argument in *ISS v. SEC*—which is now effectively ISS v. NAM. A decision is expected later this year. If ISS prevails in its challenge, the SEC will need legislation from Congress that reaffirms the Commission's authority to regulate proxy advice under the proxy solicitation rules of the Exchange Act.

## IV. Harms to Competition and Public Companies Posed by Proxy Firms' Anticompetitive Practices

As I have explained, the two major proxy firms have created an entrenched duopoly that is rife with conflicts of interest and business practices that empower the firms at the expense of public companies and Main Street investors.

Over the past 20 years, the firms have opportunistically leveraged new regulatory requirements (such as Say on Pay votes) and governance trends (such as the proliferation of ESG shareholder proposals) to increase their clients' reliance on their services. The firms (most notably ISS) also have created lucrative corporate consulting businesses to provide advice on the very topics on which they provide research and voting recommendations. The two major firms have cemented their market positions and made it highly unlikely that a new entrant could gain a meaningful market share. It is not surprising that no new competitors that seek to advise institutions broadly have emerged since Proxy Governance Inc. ceased operations in 2010.

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[35] *Proxy Voting Advice*, 87 Fed. Reg 43168 (19 July 2022). Release Nos. 34-95266, IA-6068; *available at* https://www.govinfo.gov/content/pkg/FR-2022-07-19/pdf/2022-15311.pdf.

[36] NAM Comments on File No. S7-17-21 (24 December 2021). *Available at* https://documents.nam.org/tax/nam_proxy_comments_2021.pdf.

[37] *Nat'l Ass'n of Mfrs. v. SEC*, 105 F.4th 802 (2024).

[38] *Institutional S'holder Servs. Inc. v. SEC*, No. 24-5105 (consolidated with 24-5112) (D.C. Cir.), Mot. to Voluntarily Dismiss Appeal.

The proxy firm duopoly damages public companies in several ways. The proxy firms' business model relies on a one-size-fits-all approach to corporate governance that does not try to take into account differences in companies' businesses and the flexibility allowed under securities law. Over the past 20 years, there has been a gradual homogenization of U.S. companies' compensation and governance practices, as many companies have decided that it is easier to give to the proxy giants' demands than to trust their board's judgment to select policies that are tailored to the company.

While the proxy firms assert that their error rate is low, companies continue to notice that the firms' reports often include errors and misleading statements, ranging from specific incorrect facts to disingenuous assumptions about, for instance, a company's peer group or compensation practices. These mistakes, especially when amplified by the growing use of the firms' robo-voting platforms, means that more investor shares are being voted based on flawed research before companies have a chance to request corrections. In the unlikely event that a company can persuade a proxy firm to acknowledge its mistake and publish a correction, not all clients will bother to go back and change their votes.

Another consequence of the proxy duopoly is that it has contributed to an inhospitable regulatory environment for new public companies. When faced with the spectre of having to pay ISS for equity plan consulting, haggle with the two firms after a non-supermajority Say on Pay vote, and persuade investors to disregard the firms' support of a prescriptive ESG proposal, the board of a privately held manufacturer might reasonably decide that private capital is preferable to the public markets—preventing everyday Americans from investing in their business.

## V. Recommendations to Rein in the Proxy Firm Duopoly

Given the major proxy firms' dominant market position, their glaring conflicts of interest, and their pervasive influence over proxy voting and U.S. corporate governance, it is necessary for policymakers to act to ensure appropriate regulatory oversight of proxy firms.

Manufacturers have supported legislation that reaffirms the SEC's authority to regulate proxy firms and ensures that the SEC can act to address the firms' conflicts of interest, improve the accuracy of proxy research, provide more transparency around proxy advisor policies, and ensure that investment managers fulfill their fiduciary duties to clients when hiring proxy firms to vote their shares. We commend members of this Subcommittee for your interest in proxy advice and your efforts to build on the rich legislative record of proxy firm abuses set forth by recent hearings held by the House Subcommittee on Capital Markets[39] and the House Subcommittee on Health, Employment, Labor, and Pensions.[40]

Conflicts of interest remain the clearest threat to Main Street investors posed by the proxy firm duopoly. In particular, ISS's business consulting service benefits directly from negative recommendations made by the firm's proxy voting service—incentivizing recommendations that drive businesses to purchase consulting services rather than ones that drive shareholder value creation. Glass Lewis now has its own equity plan advisory product that raises similar concerns. The firm also provides stewardship services to activists who likely will file shareholder proposals that Glass Lewis analysts will pass judgement on. The NAM has long supported efforts to prohibit, or at a

[39] *Exposing the Proxy Advisory Cartel: How ISS & Glass Lewis Influence Markets* (29 April 2025). House Committee on Financial Services, Subcommittee on Capital Markets. *See* https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=409697.

[40] *Investing for the Future: Honoring ERISA's Promise to Participants* (30 April 2025). House Committee on Education and Workforce, Subcommittee on Health, Employment, Labor, and Pensions. *See* https://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=412370.

minimum require public disclosure of, proxy firm conflicts of interest in order to protect companies from the firms and to enhance transparency and objectivity of proxy research for investors.

The NAM supports the Stopping Proxy Advisor Racketeering Act, sponsored by Chairman Fitzgerald, which would prevent proxy firms from offering proxy voting advice that is poisoned by a conflict of interest resulting from their consulting services. This prohibition would ensure that the proxy voting advice on which investors rely remains objective, and that companies are no longer forced to pay for consulting services in order to avoid the costs of overcoming negative proxy firm recommendations.

The NAM also supports a revival of the SEC's 2019 proposed rulemaking, which mandated a pre-publication draft review process to ensure that all public companies had a reasonable opportunity to correct factual errors and analytical flaws in proxy research reports before investors start voting. Such a process is far more beneficial for both companies and investors than the post-publication review that was included by the SEC in the final 2020 rule as a compromise.

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Publicly traded manufacturers are committed to growing their businesses, creating value for shareholders, and driving economic expansion, but manufacturers still must contend with proxy advisory firms that have divergent agendas and little interest in their success. This remains the case despite the fact that the SEC finalized its landmark 2020 proxy firm rule nearly five years ago—a rule that has never been allowed to take effect.

Congress now has the opportunity to preserve and improve upon that rule, including by affirming the SEC's authority to regulate proxy voting advice. Manufacturers are depending on Congress to pass legislation—and the SEC to finalize regulations—that will respond to the firms' anti-competitive behavior by reducing conflicts of interest, increasing transparency, ensuring research accuracy, limiting robo-voting, and reining in the firms' outsized influence over public company governance and the security of millions of Main Street investors' life savings.

The NAM stands ready to work with Congress to ensure that manufacturers can escape the outsized influence of proxy firms and instead focus on creating jobs, contributing to their communities, powering the American economy, and investing for the future.