IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INSTITUTIONAL SHAREHOLDER SERVICES, INC., Plaintiff, v. SECURITIES AND EXCHANGE COMMISSION and WALTER CLAYTON III in his official capacity as Chairman of the Securities and Exchange Commission, Defendants.	No. 1:19-cv-3275-APM

MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS TO INTERVENE IN SUPPORT OF DEFENDANTS

Pursuant to Federal Rule of Civil Procedure 24(a) and (b) and Local Rule 7(j), the National Association of Manufacturers (the "NAM") respectfully moves to intervene in support of Defendants in the above-captioned case. The NAM submits the accompanying memorandum and declaration in support of this Motion. Moreover, consistent with the Court's August 17, 2020 minute order imposing a summary judgment briefing schedule without further pleadings, and the parties' joint status report of August 12, 2020 indicating that Defendants were, for the time, forgoing the filing of an answer, *see* Dkt. 17 at 3, the NAM respectfully requests the Court's permission to defer filing an answer in intervention until such time as Defendants are required to answer or upon order of the Court, *see* Fed. R. Civ. P. 24(c).

Pursuant to Local Rule 7(m), counsel for NAM has conferred with counsel for Plaintiffs and the SEC. Counsel for the SEC does not oppose the Motion. Counsel for ISS stated it opposes the Motion.

Dated: October 15, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2020, I caused a copy of the foregoing document to be served on all parties through the Court's CM/ECF system.

/s/ *Helgi C. Walker*
Helgi C. Walker (D.C. Bar No. 454300)

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MEMORANDUM IN SUPPORT OF MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS TO INTERVENE IN SUPPORT OF DEFENDANTS

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The National Association of Manufacturers (the "NAM") respectfully moves the Court to grant the NAM's Motion to Intervene in Support of Defendants the U.S. Securities and Exchange Commission and Walter Clayton III in his official capacity as Chairman of the U.S. Securities and Exchange Commission (collectively, the "SEC"), *see* Fed. R. Civ. P. 24(a), 24(b), and in support of the Motion states as follows:

STATEMENT OF INTEREST

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women in the United States, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. Seventy-nine percent of Fortune 100 manufacturers are NAM members, as are 54% of Fortune 500 manufacturers. Nat'l Ass'n of Manufacturers, *About the NAM*, https://www.nam.org/about/ (last visited Oct. 14, 2020).

The NAM's members often turn to the public market to finance the significant investments in equipment and research necessary for modern manufacturing and are directly and immediately affected by the practices of proxy advisory firms that are the primary subject of this litigation. *See Exemptions from the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082 (Sept. 3, 2020) ("Final Rule"). The NAM participated throughout the regulatory process that ultimately produced the Final Rule, *see*, *e.g.*, 85 Fed. Reg. 55,082, 55,085, 55,089, 55,097, 55,103, 55,106, 55,107, 55,110; Comment Ltr. from Chris Netram, Nat'l Ass'n of Manufacturers (Feb. 3, 2020) ("NAM

Comment"), https://www.sec.gov/comments/s7-22-19/s72219-6735396-207626.pdf, and now moves to intervene in order to defend the Final Rule and the SEC's challenged regulatory regime.

BACKGROUND

I. Proxy Solicitation, Proxy Advisory Firms, And The Need For Further Regulation.

In both annual and regular meetings, publicly traded corporations provide shareholders the opportunity to vote on various matters relevant to the company. 85 Fed. Reg. 55,082, 55,082 (Sept. 3, 2020). Most shareholders do not attend these meetings in person, but instead exercise their voting rights on corporate matters via a proxy. *Id.* Congress granted the SEC broad authority to oversee and regulate proxy solicitation. *See id.*; *see also*, *e.g.*, Securities and Exchange Act of 1934, §§ 3(b), 14, 16, 23(a), 36.

So-called proxy advisory firms such as Plaintiff Institutional Shareholder Services, Inc. ("ISS") have risen to prominence in the wake of increased institutional ownership of American stocks. *See* NAM Comment at 3; *see also* 85 Fed. Reg. 55,083. According to one recent report, institutional investors now control nearly 80% of market value on U.S. exchanges. NAM Comment at 3. Proxy advisory firms provide a number of services to their clients, which include investment advisers, institutional investors, and other clients. 85 Fed. Reg. 55,083. These services include: providing research and analysis on matters subject to a vote; promulgating generally applicable benchmark voting policies; promulgating specialty voting policies on matters such as corporate social responsibility, labor policy, and environmental matters; making specific voting recommendations on matters subject to a shareholder vote; and executing proxy votes on their clients' behalf. *Id.* Fund managers at institutions, charged with voting an ever-increasing number of proxies on their clients' behalf, have turned to proxy firms to shape, and sometimes even cast, their votes. NAM Comment at 3. As a result, proxy advisory firms have enormous influence over the corporate governance policies of U.S. public companies, including members of the NAM. *Id.*

The NAM does not object to proxy firms playing a role in providing accurate information to the marketplace. To the extent that their services provide institutional investors with more complete information on which to base proxy voting decisions, the NAM believes that proxy firms can be constructive to the market. A neutral, fact-based process that results in helpful recommendations presented alongside management proposals can only benefit investors and issuers. However, prior to the Final Rule, the proxy advice process was far from a neutral, fact-based one, and the recommendations produced were often problematic in a variety of ways that harmed the NAM's members. The flaws embedded in the business model of proxy advisory firms include, but are not limited to, the following:

First, proxy firms operate with significant, but undisclosed, conflicts of interest. Declaration of Christopher Netram ("Netram Decl.") ¶ 6.a. Proxy advisory firms Glass Lewis and ISS are effectively a duopoly in the proxy advisory space. The former is owned by an investor that engages in proxy contests, while the latter operates a consulting business that counsels companies on the very corporate governance policies on which the advisory side of the firm makes recommendations. *Id.* The ISS consulting service is particularly concerning to manufacturers and their investors given that the complexity and lack of transparency inherent in ISS's proxy voting advice provides a strong incentive for companies to purchase consulting services from ISS in order to model and predict the impact of ISS's own standards. *Id.*

Second, proxy firms insist upon a one-size-fits-all approach to corporate governance that does not take into account differences in companies' business models and the flexibility allowed under securities law. Netram Decl. ¶ 6.b. Increasingly, they also advocate for a normative agenda that seeks to shape—rather than analyze and report on—corporate behavior. *Id.*

Third, the process by which proxy firm recommendations are developed lacks transparency, and the firms' one-size-fits-all policy guidelines are likewise established out of the public eye. Netram Decl. ¶ 6.c. In addition, the firms issue specialty reports developed using vague methodologies that depart from their standard benchmark policies. *Id.*

Fourth, proxy firm reports and recommendations feature significant errors and misleading statements, ranging from specific incorrect facts to flawed assumptions about, for instance, a company's peer group or compensation practices. Netram Decl. ¶ 6.d. The recommendations also feature terms with common market meanings like "'total shareholder return'" but often use opaque calculation methodologies that vary from traditional market practice. *Id.*

Fifth, proxy firms have been steadfastly resistant to engaging in a productive dialogue with issuers to correct these errors in a timely manner. Netram Decl. ¶ 6.e.

Sixth, proxy firms often engage in the automatic submission of proxy votes (a practice sometimes known as "robo-voting") on behalf of their clients, meaning that the flaws intrinsic to their recommendations are translated immediately into voting power, completely cutting investment advisers and the company shareholders out of the process, thereby depriving issuers of a chance to correct the record or provide investors with additional information. Netram Decl. ¶ 6.f.

As the SEC has recognized, proxy advice "is often an important factor in the clients' proxy voting decisions." 85 Fed. Reg. 55,083. This level of influence gives proxy firms significant power over proxy results, forcing issuers to contort their policies to meet the proxy firms' guidelines or risk an adverse recommendation and corresponding vote against the company on the proxy ballot. Netram Decl. ¶ 7. Studies have found that the proxy firms can control up to 25% of the shareholder vote—much of which is submitted (often automatically) shortly after the proxy firm report is published, limiting issuers' ability to engage in a productive dialogue with their

shareholders about an issue. *Id.* Clearly, there was and is a regulatory need to address these problems.

II. The SEC's Regulatory Response And This Litigation.

In response to the problems identified above, as well as others, the SEC took a series of regulatory steps, culminating in a Final Rule issued on September 3, 2020.

In August 2019, the SEC first announced a guidance document clarifying that proxy voting advice provided by a proxy advisory firm generally constitutes a solicitation under the federal proxy rules. *See Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, 84 Fed. Reg. 47,416 (Sept. 10, 2019) ("Proxy Guidance"). Plaintiff ISS filed a complaint in this Court in October 2019 challenging the Proxy Guidance, arguing that the Proxy Guidance exceeded the SEC's statutory authority under the Exchange Act, that the Proxy Guidance was procedurally improper because it was a substantive rule that should have been subject to the notice-and-comment procedures of the Administrative Procedure Act, and that the Proxy Guidance should be set aside as arbitrary and capricious. *See* Dkt. 1.

The SEC, however, published proposed amendments to its rules governing proxy solicitations in November 2019, *see Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, 84 Fed. Reg. 66,518 (Dec. 4, 2019) ("Proposed Rule"), to codify the SEC's interpretation that proxy voting advice generally constitutes a solicitation after notice and comment. This Court stayed this litigation pending the outcome of the rulemaking. *See* Dkt. 14. Numerous commenters participated in the notice and comment period, including ISS, *see* Comment Ltr. from Gary Retelny, President and CEO of ISS (Jan. 31, 2020),

https://www.sec.gov/comments/s7-22-19/s72219-6732023-207470.pdf; the NAM, *see* NAM Comment; and numerous members of the NAM.[1]

On July 22, 2020, the SEC issued its Final Rule along with an extensive release explaining the SEC's actions. Notably, the SEC expressly recognized the harms and problems identified by the NAM and adopted various regulatory solutions to curtail those problems. *See*, *e.g.*, 85 Fed. Reg. 55,082, 55,085, 55,089, 55,097, 55,103, 55,106, 55,107, 55,110. The Final Rule accomplishes three things relevant to this litigation; the Rule:

1) includes proxy voting advice within the definition of proxy solicitation, 85 Fed. Reg. 55,091;

2) amends the exemptions to otherwise applicable information and filing requirements to condition their availability on proxy voting advice businesses: (a) making various conflicts-of-interest disclosures, (b) providing their reports to issuers before or at the time they deliver those reports to their clients; and (c) developing procedures reasonably designed to inform their clients about an issuer's views regarding the advice before voting occurs, 85 Fed. Reg. 55,098-55,115; and

3) defines omissions of material information regarding a proxy voting advice business's methodology, sources of information, and conflicts of interest (among other things), as false and misleading under the securities laws, 85 Fed. Reg. 55,121.

ISS filed its First Amended Complaint and a motion for summary judgment on September 18, 2020. Dkts. 19, 20-1. ISS argues that the Final Rule and the Proxy Guidance exceed the SEC's statutory authority under the Exchange Act and are arbitrary and capricious; it also argues that the

[1] *See, e.g.*, Comment Ltr. from General Motors Co. (Feb., 25, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6862021-210588.pdf; Comment Ltr. from Exxon Mobil Corp. (Feb. 3, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6742834-207796.pdf; Comment Ltr. from FedEx Corporation (Feb. 3, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6738829-207681.pdf; Comment Ltr. from Ball Corp. (Jan. 31, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6730830-207424.pdf; Comment Ltr. from Garmin Ltd. (Jan. 27, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6703085-206073.pdf; Comment Ltr. from PACCAR Inc. (Jan. 24, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6702759-206068.pdf.

Final Rule violates the First Amendment's protection against compelled speech. *See* Dkt. 20-1, at 16-44. ISS also continues to argue that the Proxy Guidance is procedurally improper under the Administrative Procedure Act. *Id.* at 45. The First Amended Complaint asks this Court to enter judgment in ISS's favor and grant it a host of declaratory and injunctive relief, setting aside the Final Rule and the Proxy Guidance. *See* Dkt. 19, at 29.

Counsel for the NAM has conferred with counsel for the parties regarding this motion, noting that the NAM intends to intervene and file a dispositive motion and response to ISS's motion for summary judgment in accordance with the existing briefing schedule. Counsel for the SEC stated that the SEC does not oppose the NAM's intervention. Counsel for ISS said ISS opposes the NAM's intervention.

LEGAL STANDARD

Under Rule 24(a)(2), a movant has a right to intervene when: (1) the motion is timely; (2) the movant "claims an interest relating to the property or transaction which is the subject of the action"; (3) "the [movant] is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"; and (4) "the [movant's] interest is [not] adequately represented by existing parties." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003) (quotation marks omitted). Under Rule 24(b), "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact."

ARGUMENT

The NAM, through its members, has a clear and substantial interest in defending the Final Rule and the SEC's regulatory regime for proxy advisory firms. The NAM's members have been directly harmed by the opaque practices and conflicts of interest of proxy advisory firms in the past, and the SEC's Final Rule and Proxy Guidance provide substantial protection against those

harms. The NAM has been participating in the regulatory proceedings before the SEC for years on this matter. *See* NAM Comment at 2, 5 (detailing the NAM's involvement). ISS now seeks to invalidate the Final Rule and the substantial protections it affords the NAM's members.

As explained below, the NAM meets all the requirements of Rules 24(a) and (b). This Court should therefore either grant intervention as of right under Rule 24(a) or, alternatively, permissive intervention under Rule 24(b) so that the NAM can file a dispositive motion on ISS's complaint and an opposition to ISS's motion for summary judgment in defense of the Final Rule and Proxy Guidance, and other appropriate briefing under the Court's existing briefing schedule.

I. The NAM Is Entitled To Intervene As Of Right Under Rule 24(a).

The NAM is entitled to intervene in this action as a matter of right under Rule 24(a) because: **(A)** the NAM has Article III standing; **(B)** the motion is timely; **(C)** the NAM claims an interest relating to the Final Rule that is the subject of this act; **(D)** disposition of this action may, as a practical matter, impair or impede the NAM's ability to protects its interests; and **(E)** the NAM's interests are not adequately represented by existing parties. The Court should therefore grant the NAM's motion under Rule 24(a).

A. The NAM Has Article III Standing.

The D.C. Circuit traditionally requires "a party seeking to intervene as of right [to] demonstrate that it has standing under Article III of the Constitution." *Fund for Animals*, 322 F.3d at 731-32.[2] Trade associations like the NAM have "organizational standing" where they can

[2] The Supreme Court has held that an intervenor of right need only demonstrate Article III standing when "seek[ing] additional relief beyond that which the plaintiff requests." *Town of Chester v. Laroe Estates*, 137 S. Ct. 1645, 1651 (2017); *accord Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020) (holding that Third Circuit erred in inquiring into intervenor's independent Article III appellate standing when the intervenor sought same relief as the government); *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (state legislative house did not have "to demonstrate standing" to "interven[e] in support of the State Defendants"). Here, although the NAM seeks to intervene in support of the

"demonstrate that at least one of their members would otherwise have standing to sue in his or her own right; that the interests they seek to protect are germane to their organizations' purposes; and that neither the claim asserted nor the relief requested requires the participation of individual members." *Air All. Houston v. Envt'l Prot. Agency*, 906 F.3d 1049, 1058 (D.C. Cir. 2018) (quoting *Sierra Club v. EPA.*, 755 F.3d 968, 973 (D.C. Cir. 2014)). The NAM meets these requirements here, just as it routinely meets them in other cases where it intervenes to vindicate its members' interests. *See*, *e.g.*, *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 395 F. Supp. 3d 1, 15-22 (D.D.C. 2019) (granting the NAM's motion to intervene as of right).

1. The NAM, through its members, meets the traditional Article III standing requirements of injury in fact, causation, and redressability. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The very companies whose stock is being voted plainly have standing to defend the SEC's rules regulating *how* that stock is voted.

The D.C. Circuit routinely finds "a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 317 (D.C. Cir. 2015). Here, the NAM's members include numerous publicly traded manufacturers, including 79% of Fortune 100 manufacturers. Netram Decl. ¶ 3. Member corporations have routinely experienced the negative consequences associated with the out-sized and under-regulated impact that proxy advisory firms such as ISS have on important matters of corporate governance. *See* Netram Decl. ¶ 4 (noting survey results showing that a majority of NAM members who are

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defendant and does not seek relief beyond that which the SEC seeks—a judgment upholding the SEC's Final Rule—the D.C. Circuit has maintained that *Town of Chester* does not cast doubt upon "[the D.C. Circuit's] settled precedent that all intervenors must demonstrate Article III standing." *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1233 (D.C. Cir. 2018). The NAM therefore demonstrates its Article III standing in an abundance of caution, and to ensure its ability to participate fully in all stages of this litigation, including any appeal.

publicly traded had to divert resources from core business practices to respond to actions of proxy advisors). These negative consequences include, but are not limited to: Proxy advisor recommendations that contain misleading or inaccurate information about matters subject to a vote, Netram Decl. ¶ 8.a; proxy advisor recommendations that seek to apply a one-size-fits-all approach to public company governance, Netram Decl. ¶ 8.b; a lack of transparency regarding proxy advisors' sources of information for their voting recommendations and other reports, Netram Decl. ¶ 8.c; a lack of transparency about the methodologies proxy advisors use in formulating their recommendations and various reports, Netram Decl. ¶ 8.d; likely undisclosed conflicts of interest that would materially impact the objectivity of proxy advisors' proxy voting advice, Netram Decl. ¶ 8.e; proxy advisors releasing recommendations and automatically submitting shareholder votes with no practical means for the NAM's members to correct the record prior to shareholder votes being cast, Netram Decl. ¶ 8.f; and resistance from proxy advisors to engaging in productive dialogue to correct errors or misunderstandings or to provide investors with information about NAM members' perspectives on the advisors' recommendations, Netram Decl. ¶ 8.g.

The Final Rule remediates these and other problems. It makes clear that the securities laws do not countenance proxy advisory firms' misleading behavior—including their "[f]ailure to disclose material information regarding proxy voting advice." 85 Fed. Reg. 55,155. It adds common sense notification standards, allowing proxy advisory firms to benefit from certain regulatory exemptions, provided simply that they make their voting advice available to the subject of that advice. *Id.* at 55,109. And it ensures that proxy shareholders can hear both sides of the story—again, easing the regulatory burdens on proxy advisory firms, provided simply that they give their clients a way to learn of "written statements regarding [their] proxy voting advice by registrants that are the subject of such advice." *Id.*

The Final Rule thus clearly benefits the NAM's members, establishing an injury in fact in the event the Rule were set aside here. *See*, *e.g.*, *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (trade association had standing to intervene where association's members "benefit from the EPA's . . . interpretation" and "would suffer concrete injury if the court grants the relief petitioners seek"); *Fund for Animals*, 322 F.3d at 733 (Mongolia had standing to intervene on the side of federal defendant agency that had promulgated regulation subjecting Mongolian sheep to lesser regulation because "the country benefits from [the agency's] current regulations, and Mongolia would suffer concrete injury"—in the form of "[t]he threatened loss of tourist dollars"—"if the court were to grant the relief the plaintiffs seek"). Moreover, "[t]he causation and redressability requirements of Article III standing are easily satisfied" here because if ISS's litigation were successful, the NAM's members would be stripped of the benefit they have obtained through the Final Rule. *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 211-12 (D.C. Cir. 2013) (causation and redressability met where regulatory pilot program increased competition against association members). The NAM thus meets the traditional requirements of injury in fact, traceability, and redressability.

2. The NAM also meets the organizational standing requirements with respect to germaneness and individual member involvement.

First, the "requirement of germaneness is 'undemanding'; 'mere pertinence between litigation subject and organizational purpose' is sufficient." *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 636 (D.C. Cir. 2000) (quoting *Humane Soc'y v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988)). The NAM exists to advocate for the interests of America's manufacturers, including the large number of those manufacturers whose shares are traded on public exchanges. Netram Decl. ¶ 10. As noted in the NAM's comment letter before the SEC, ISS's services have been "particularly

concerning to manufacturers," NAM Comment at 4, because of the "enormous influence" proxy advisory firms have over manufacturers' corporate governance policies, *id.* at 3. There is a clear connection between the NAM's purpose and this litigation—indeed, the NAM has been deeply involved in the regulatory process that ultimately resulted in the Final Rule for *years*.[3] Advocating policy positions, including defending in litigation regulations that create a predictable and workable regulatory scheme that protects its members from harassment and the effects of market failures, is a core part of the NAM's mission. Netram Decl. ¶ 11; *see also Wash. All. of Tech. Workers*, 395 F. Supp. 3d at 17-18 (NAM's mission includes policy and litigation on behalf of its members).

Second, nothing about this litigation would require individual member participation. This case concerns a broadly applicable set of regulations that will impact most members of the NAM that are publicly traded. Netram Decl. ¶¶ 3, 10, 12-13. This case is about the lawfulness of the

[3] *See* NAM Comment at 2, 5 (detailing the NAM's involvement); *see also* Nat'l Ass'n of Manufacturers, Press Release, *Manufacturers Score 'Major Win' on Final SEC Proxy Advisory Firm Regulations* (July 22, 2020), https://www.nam.org/manufacturers-score-major-win-on-final-sec-proxy-advisory-firm-regulations-9894/; Nat'l Ass'n of Manufacturers, Press Release, *NAM Welcomes SEC Guidance as Major Win for Manufacturers* (Aug. 21, 2019) (supporting SEC proxy advisory firm guidance documents), https://www.nam.org/nam-welcomes-sec-guidance-as-major-win-for-manufacturers-5698/; Comment Ltr. from Nat'l Ass'n of Manufacturers (Mar. 5, 2019), https://www.sec.gov/comments/4-725/4725-5020171-182986.pdf; Jay Timmons, NAM President and CEO, *Proxy Advisory Firms Are a Silent Threat to Main Street Investors*, The Hill (Dec. 12, 2018), https://thehill.com/opinion/finance/420869-proxy-advisory-firms-are-a-silent-threat-to-main-street-investors; Christopher Netram, *NAM, U.S. Chamber Launch Major Six-Figure Ad Campaign Ahead of SEC Roundtable on Proxy Advisory Firms* (Nov. 7, 2018), https://www.shopfloor.org/2018/11/nam-u-s-chamber-launch-major-six-figure-ad-campaign-ahead-sec-roundtable-proxy-advisory-firms/; Comment Ltr. from Nat'l Ass'n of Manufacturers (Oct. 30, 2018), https://www.sec.gov/comments/4-725/4725-4581799-176285.pdf; Nat'l Ass'n of Manufacturers, Press Release, *SEC Ruling Puts Manufacturers First* (Sept. 13, 2018) (supporting SEC's decision to withdraw no-action letters on proxy advisory firms), https://www.nam.org/sec-ruling-puts-manufacturers-first-1013/?stream=series-press-releases; Comment Ltr. from Nat'l Ass'n of Manufacturers (July 17, 2018), http://documents.nam.org/TAX/NAM_Comments_SEC_Strategic_Plan.pdf.

Final Rule and does not hinge on any particular fact about any one of the NAM's members. Therefore it does not require individual members to participate. *Wash. All. of Tech. Workers*, 395 F. Supp. 3d at 17-18 ("Member participation is not required where a suit raises a pure question of law and neither the claims pursued nor the relief sought require the consideration of the individual circumstances of any aggrieved member of the organization.") (quotation marks omitted).

B. The Motion Is Timely.

Rule 24(a) requires that motions to intervene be "timely." The timeliness of a motion to intervene is "to be judged in consideration of all the circumstances," *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (quotation marks omitted), but mainly considers the "time elapsed since the inception of the action" and "the probability of prejudice to those already party to the proceedings." *Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 10 (D.D.C. 2016). The NAM's motion is timely.

First, very little time—less than a month—has elapsed since ISS filed its First Amended Complaint on September 18, 2020. *See* Dkt. 19. This Court routinely finds motions filed on similar timeframes to be timely. *See*, *e.g.*, *Connecticut v. United States Dep't of the Interior*, 344 F. Supp. 3d 279, 304 (D.D.C. 2018) (motion filed within one month of the complaint); *Forest Cty.*, 317 F.R.D. at 13 (motion filed before defendants filed answer); *Waterkeeper All., Inc. v. Wheeler*, 330 F.R.D. 1, 6 (D.D.C. 2018) (motion filed almost two months after suit commenced); *100Reporters LLC v. United States Dep't of Justice*, 307 F.R.D. 269, 274-75 (D.D.C. 2014) (motion filed approximately three months after the complaint); *Navistar, Inc. v. Jackson*, 840 F. Supp. 2d 357, 361 (D.D.C. 2012) (motion filed two and a half months after the complaint).

Second, there will be no prejudice to the parties. The SEC does not oppose intervention. And the NAM has committed to filing its dispositive motion and opposition to ISS's summary judgment consistent with the Court's minute order imposing the briefing schedule in this case and

therefore will not disrupt the proceedings. Moreover, as demonstrated by ISS's motion for summary judgment, filed the same day as the First Amended Complaint, "[t]he claims in this litigation are *legal challenges* to the federal government's" regulations and involve no "discovery" which intervention might extend nor any "additional factual development." *Roane v. Leonhart*, 741 F.3d 147, 152 (D.C. Cir. 2014) (reversing district court denial of intervention as of right). The NAM's motion is "highly unlikely to disadvantage the existing parties," and is thus timely. *Id.*

C. The NAM And Its Members Have An Interest Relating To The Final Rule That Is The Subject Of This Action.

"[S]atisfying constitutional standing requirements demonstrates the existence of a legally protected interest for purposes of Rule 24(a)." *Jones v. Prince George's Cty., Md.*, 348 F.3d 1014, 1019 (D.C. Cir. 2003). For the same reasons that the NAM has Article III standing, *see* Part I.A, *supra*, it has a substantial legal interest in this action under Rule 24(a).

D. The Disposition Of This Action May, As A Practical Matter, Impair Or Impede The NAM's And Its Members' Ability To Protect Their Interests.

"In determining whether a movant's interests will be impaired by an action, courts in this circuit look to the 'practical consequences' to the movant of denying intervention." *Am. Horse Prot. Ass'n v. Veneman*, 200 F.R.D. 153, 158 (D.D.C. 2001); *see also* Fed. R. Civ. P. 24, Advisory Committee's Note ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.").

ISS here seeks declaratory and injunctive relief setting aside the Final Rule and excusing proxy advisory firms from the regulatory requirements imposed on them by the Final Rule. Such an outcome would directly impair the NAM's and its members' interests in a fair, open, neutral, and conflict-of-interest-free regulatory structure.

Moreover, amicus status would be inadequate. The SEC is under no obligation to adopt the NAM's views in litigation, which could imperil the NAM's rights and interests. *See generally*

United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) (discussing the principle of "party presentation"); *Eldred v. Ashcroft*, 255 F.3d 849, 850-52 (D.C. Cir. 2001) (declining to adopt amicus arguments not expressly adopted by the parties). As a practical matter, denying NAM's right to intervene will impair its members' ability to defend their interests in this litigation.

E. The NAM's Interests Will Not Be Adequately Represented By Existing Parties.

The NAM need only show that representation of its interests by existing parties "may be" inadequate; "the burden of making that showing should be treated as minimal." *Fund for Animals*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *Dimond v. D.C.*, 792 F.2d 179, 192 (D.C. Cir. 1986) ("[T]he applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate."). The NAM easily clears that bar.

First, ISS obviously does not represent the NAM's or its members' interests here. But neither does the SEC. Unlike the NAM, the SEC does not represent the interests of publicly traded companies, the governance of which is affected by proxy advisory firms. Rather, agency defendants are "obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor[s]," and such "potential conflict" satisfies "the minimal burden of showing that their interests may not be adequately represented by the existing parties." *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1255-56 (10th Cir. 2001). For that reason, courts frequently conclude "that governmental entities do not adequately represent the interests of aspiring intervenors" because an agency's obligation "is to represent the interests of the American people" writ large, not the more particular interests of a company, organization, or industry. *Fund for Animals*, 322 F.3d at 736; *Dimond*, 792 F.2d at 192-93; *see also Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009) ("The EPA does not oppose intervention, and the D.C. Circuit has

repeatedly held that private companies can intervene on the side of the government, even if some of their interests converge."). The NAM and its members, as the private sector entities directly affected by proxy advisory firms' impact on how their stock is voted, have their own views on why the Final Rule and Proxy Guidance are both legal and good policy, including potential issues around the proper scope of agency authority and judicial deference. The SEC simply may not agree with those views or advance those arguments given its distinct institutional and governmental interests, much as it declined to adopt some of the NAM's substantive recommendations regarding the Final Rule during the rulemaking.

Second, if the SEC loses this case, "the Solicitor General may decide that the matter lacks sufficient general importance to justify" an appeal. *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004). Intervention is therefore critical to ensure that, in that event, the NAM could continue to press its interests, which could otherwise be lost at that point.

II. The Court Should Alternatively Grant Permissive Intervention Under Rule 24(b).

In the alternative, this Court should grant the NAM permission to intervene under Rule 24(b). *See* Fed. R. Civ. P. 24(b) ("On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact."). This is not a restrictive standard: "Rule 24(b) . . . provides basically that anyone may be permitted to intervene if his claim and the main action have a common question of law or fact," *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967), so long as intervention would not "unduly delay or prejudice the rights of the original parties," *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009). This Court has "wide latitude" and "discretio[n]" to grant "[p]ermissive intervention." *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 331 F.R.D. 5, 9 (D.D.C. 2019) (quotation marks omitted).

The NAM also easily meets this standard. The Motion here is timely, and no party will be prejudiced by the NAM's intervention and participation. *See* Part I.B, *supra*. And there is no doubt that there are "common question[s]" of law between the NAM's position and the "main action." The NAM addressed the legal issues that are at the heart of this litigation in its Comment Letter before the SEC, including statutory authority matters and constitutional concerns. *See* NAM Comment at 5, 12-13. There is no need to reach permissive intervention here because the NAM has demonstrated intervention as of right, but if the Court believes otherwise, it should grant discretionary leave to intervene for the same reasons the NAM has articulated supporting intervention as of right. *See McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970) (permissive intervention appropriate "where no one would be hurt and greater justice would be attained") (quotation marks omitted).

CONCLUSION

For the foregoing reasons, the NAM respectfully requests that the Court grant the NAM's Motion so that the NAM can intervene to defend its interests in upholding the Final Rule.

Dated: October 15, 2020

Respectfully submitted,

/s/ *Helgi C. Walker*
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Lucas C. Townsend (D.C. Bar No. 1000024)
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Counsel for Intervenor the National Association of Manufacturers

CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of October, 2020, I caused a copy of the foregoing document to be served on all parties through the Court's CM/ECF system.

/s/ *Helgi C. Walker*
Helgi C. Walker (D.C. Bar No. 454300)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INSTITUTIONAL SHAREHOLDER SERVICES, INC., Plaintiff, v. SECURITIES AND EXCHANGE COMMISSION and WALTER CLAYTON III in his official capacity as Chairman of the Securities and Exchange Commission, Defendants.	No. 1:19-cv-3275-APM

DECLARATION OF CHRISTOPHER NETRAM IN SUPPORT OF MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS TO INTERVENE IN SUPPORT OF DEFENDANTS

I, Christopher Netram, have personal knowledge of the matters included herein and hereby declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am the vice president of tax and domestic economic policy at the National Association of Manufacturers ("NAM"). I am over the age of 18 and suffer from no impairments that would prevent me from giving a declaration.

2. The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women in the United States, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a

policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

3. Seventy-nine percent of Fortune 100 manufacturers are NAM members, as are 54% of Fortune 500 manufacturers. *See* Nat'l Ass'n of Manufacturers, *About the NAM*, https://www.nam.org/about/ (last visited Oct. 14, 2020). Numerous members of the NAM filed comment letters in the notice-and comment process supporting the SEC's proxy solicitation rule. *See*, *e.g.*, Comment Ltr. from General Motors Co. (Feb., 25, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6862021-210588.pdf; Comment Ltr. from Exxon Mobil Corp. (Feb. 3, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6742834-207796.pdf; Comment Ltr. from FedEx Corporation (Feb. 3, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6738829-207681.pdf; Comment Ltr. from Garmin Ltd. (Jan. 27, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6703085-206073.pdf; Comment Ltr. from Ball Corp. (Jan. 31, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6730830-207424.pdf; Comment Ltr. from PACCAR Inc. (Jan. 24, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6702759-206068.pdf. These members of the NAM would, like other publicly traded companies, be adversely affected if the Final Rule were set aside.

4. NAM members may turn to the public market to finance the significant investments in equipment and research necessary for modern manufacturing and are thus directly and immediately affected by the practices of proxy advisory firms that are the primary subject of this litigation. *See Exemptions from the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082, (Sept. 3, 2020) ("Final Rule"). According to the NAM's Fourth Quarter 2018 Manufacturers' Outlook Survey, nearly 78% of public company respondents were concerned about the actions of

proxy advisory firms, and 56% of them found that they were having to divert resources from their core business functions in order to respond to the actions of proxy advisory firms. *See* NAM Manufacturers' Outlook Survey, Fourth Quarter 2018 at 8, 13 (Dec. 20, 2018), https://www.nam.org/wp-content/uploads/2019/05/NAM-Q4-2018-Manufacturers-Outlook-Survey.pdf.

5. The NAM actively participated throughout the regulatory process that ultimately produced the Final Rule. *See*, *e.g.*, 85 Fed. Reg. 55,082, 55,085, 55,089, 55,097, 55,103, 55,106, 55,107, 55,110; Comment Ltr. from Chris Netram, Nat'l Ass'n of Manufacturers (Feb. 3, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6735396-207626.pdf; Comment Ltr. from Chris Netram, Nat'l Ass'n of Manufacturers (Mar. 5, 2019), https://www.sec.gov/comments/4-725/4725-5020171-182986.pdf; Comment Ltr. from Chris Netram, Nat'l Ass'n of Manufacturers (Oct. 30, 2018), https://www.sec.gov/comments/4-725/4725-4581799-176285.pdf.

6. The NAM and its members have first-hand experience with flaws embedded in the business model of proxy advisory firms, including the following:

a. Proxy firms operate with significant, but undisclosed, conflicts of interest. Proxy advisory firms Glass Lewis and ISS are effectively a duopoly in the proxy advisory space. The former is owned by an investor that engages in proxy contests, while the latter operates a consulting business that counsels companies on the very corporate governance policies on which the advisory side of the firm makes recommendations. The ISS consulting service is particularly concerning to manufacturers and their investors given that the complexity and lack of transparency inherent in ISS's proxy voting advice provides a strong incentive for companies to purchase consulting services from ISS in order to model and predict the impact of ISS's own standards.

b. Proxy firms insist upon a one-size-fits-all approach to corporate governance that does not take into account differences in companies' business models and the flexibility allowed under securities law. Increasingly, they also advocate for a normative agenda that seeks to shape—rather than analyze and report on—corporate behavior.

c. The process by which proxy firm recommendations are developed lacks transparency, and the firms' one-size-fits-all policy guidelines are likewise established out of the public eye. In addition, the firms issue specialty reports developed using vague methodologies that depart from their standard benchmark policies.

d. Proxy firm reports and recommendations feature significant errors and misleading statements, ranging from specific incorrect facts to flawed assumptions about, for instance, a company's peer group or compensation practices. The recommendations also feature terms with common market meanings like "total shareholder return" but often use opaque calculation methodologies that vary from traditional market practice.

e. Proxy firms have been steadfastly resistant to engaging in a productive dialogue with issuers to correct these errors in a timely manner.

f. Proxy firms often engage in the automatic submission of proxy votes (a practice sometimes known as "robo-voting") on behalf of their clients, meaning that the flaws intrinsic to their recommendations are translated immediately into voting power, completely cutting investment advisers and the company shareholders out of the process, thereby depriving issuers of a chance to correct the record or provide investors with additional information.

7. As the SEC has recognized, proxy advice "is often an important factor in the clients' proxy voting decisions." 85 Fed. Reg. 55,083. This level of influence gives proxy firms significant

power over proxy results, forcing issuers to contort their policies to meet the proxy firms' guidelines or risk an adverse recommendation and corresponding vote against the company on the proxy ballot. Studies have found that the proxy firms can control up to 25% of the shareholder vote—much of which is submitted (often automatically) shortly after the proxy firm report is published, limiting issuers' ability to engage in a productive dialogue with their shareholders about an issue. Malenko, Nadya and Yao Shen. "The Role of Proxy Advisory Firms: Evidence from a Regression-Discontinuity Design." *The Review of Financial Studies*, Volume 29, Issue 12. December 2016.

8. Members of the NAM, including the members identified above, have experienced many of the following harms:

a. proxy advisory recommendations that contain misleading or inaccurate information about matters subject to a vote;

b. proxy advisor recommendations that seek to apply a one-size-fits-all approach to public company governance;

c. a lack of transparency regarding proxy advisors' sources of information for their voting recommendations and other reports;

d. a lack of transparency about the methodologies proxy advisors use in formulating their recommendations and various reports;

e. likely undisclosed conflicts of interest that would materially impact the objectivity of proxy advisors' proxy voting advice;

f. proxy advisors releasing recommendations and automatically submitting shareholder votes with no practical means for the NAM's members to correct the record prior to shareholder votes being cast; and

g. resistance from proxy advisors to engaging in productive dialogue to correct errors or misunderstandings or to provide investors with information about NAM members' perspectives on the advisors' recommendations.

9. In the NAM's experience, proxy advisors wield significant influence, and their reports and recommendations often influence ultimate voting outcomes in ways that have been harmful to publicly traded members of the NAM. The regulatory restraints imposed by the Final Rule would address the harms NAM members have experienced.

10. The NAM exists to advocate for the interests of America's manufacturers, including the large number of those manufacturers whose shares are traded on public exchanges.

11. Advocating policy positions, including defending in litigation regulations that create a predictable and workable regulatory scheme that protects its members from harassment and the effects of market failures, is a core part of the NAM's mission.

12. The NAM supports the Final Rule because it remedies many of the deficiencies in the proxy solicitation process as it concerns proxy advisors and thus benefits the NAM's members by making the proxy solicitation process more transparent and significantly less prone to the harms identified above.

13. The NAM's members would be significantly injured if the Final Rule were to be vacated or otherwise invalidated because the NAM's members would lose the significant benefits of the Final Rule and be again subjected to the various harms identified above.

Executed: 10/15/2020

Silver Spring, MD

By: _____

Christopher Netram

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INSTITUTIONAL SHAREHOLDER SERVICES, INC., Plaintiff, v. SECURITIES AND EXCHANGE COMMISSION and WALTER CLAYTON III in his official capacity as Chairman of the Securities and Exchange Commission, Defendants.	No. 1:19-cv-3275-APM

[PROPOSED] ORDER GRANTING THE MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS TO INTERVENE IN SUPPORT OF DEFENDANTS

Having considered the Motion of the National Association of Manufacturers to intervene in support of Defendants, and Plaintiff's objections thereto, it is hereby **ORDERED** that:

1. I find that all the requirements of Federal Rule of Civil Procedure 24(a) are met, and in any event, all the requirements of Federal Rule of Civil Procedure 24(b) are met as well.

2. I also find that the Motion establishes that the National Association of Manufacturers has standing under Article III of the Constitution for the reasons given in the Motion.

3. The Motion of the National Association of Manufacturers to intervene in support of Defendants is therefore **GRANTED**.

4. Consistent with the Motion, the National Association of Manufacturers shall file a dispositive motion and opposition to Plaintiffs' motion for summary judgment, Dkt. 20-1, no later than October 30, 2020 and shall otherwise comply with the Court's minute order regarding the

briefing schedule in this matter unless, upon motion granted by the Court or by the Court's own motion or order, that schedule is altered.

SO ORDERED.

ENTERED this _____ day of _____, 20__.

_____
AMIT P. MEHTA
United States District Judge

LOCAL RULE 7(K) LIST OF PERSONS TO BE NOTIFIED OF ENTRY OF PROPOSED ORDER GRANTING THE MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS TO INTERVENE IN SUPPORT OF DEFENDANTS

Pursuant to LCvR 7(k), the following persons are entitled to be notified of entry of the foregoing Proposed Order:

Helgi C. Walker (D.C. Bar No. 454300)
Lucas C. Townsend (D.C. Bar No. 1000024)
Jeremy M. Christiansen (D.C. Bar No. 1044816)
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INSTITUTIONAL SHAREHOLDER SERVICES, INC., Plaintiff, v. SECURITIES AND EXCHANGE COMMISSION and WALTER CLAYTON III in his official capacity as Chairman of the Securities and Exchange Commission, Defendants.	No. 1:19-cv-3275-APM

FRCP 7.1 AND RULE LCvR 26.1 CERTIFICATE

I, the undersigned, counsel of record for the National Association of Manufacturers certify that to the best of my knowledge and belief, there are no parent companies, subsidiaries, affiliates, or companies which own at least 10% of the stock of the National Association of Manufacturers and which have any outstanding securities in the hands of the public.

Dated: October 15, 2020

Respectfully submitted,

/s/ *Helgi C. Walker*
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Lucas C. Townsend (D.C. Bar No. 1000024)
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Counsel for Intervenor the National Association of Manufacturers

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2020, I caused a copy of the foregoing document to be served on all parties through the Court's CM/ECF system.

/s/ *Helgi C. Walker*
Helgi C. Walker (D.C. Bar No. 454300)