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February 3, 2020

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

Re: File No. S7-22-19: *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*

Dear Ms. Countryman:

The National Association of Manufacturers appreciates the opportunity to provide comments to the Securities and Exchange Commission on File No. S7-22-19, Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice.[1]

The NAM is the largest manufacturing trade association in the United States, representing small and large manufacturers in every industrial sector. These businesses often turn to the public market to finance the significant investments in equipment and research necessary for manufacturing success. The public market also empowers manufacturers to drive economic expansion and job creation across the country, enabling the industry to employ 13 million Americans across all 50 states. Millions of these Americans enjoy competitive retirement benefits that also depend on the public market, as 67 percent of manufacturing workers participate in a workplace retirement plan.[2]

It is clear that the sustained success of innovative manufacturers in the United States and the investment returns valued by millions of hard-working Americans depend on a vibrant public market that supports capital formation and long-term growth. Manufacturers know that a central factor to their success as publicly traded companies is a proxy process that enables smart business growth and strong investor returns. A well-calibrated proxy process allows company management to engage in a productive dialogue with investors, who are of course the ultimate owners of any publicly traded corporation, about key aspects of the business. The NAM is committed to supporting a proxy process that enables, rather than impedes, this vital investor-management dialogue, and we applaud the SEC's ongoing efforts to institute proxy reforms that benefit investors and issuers alike.

In particular, we are encouraged that the SEC has over the last two years made several notable reforms to right-size the role that proxy advisory firms play in the marketplace, and that the Commission's recently proposed rule would, if finalized, build on this momentum.

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[1] *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.sec.gov/rules/proposed/2019/34-87457.pdf. Hereinafter "proposed rule," "proposing release," "proposal," or "rule proposal."

[2] *National Compensation Survey: Employee Benefits*. Bureau of Labor Statistics, March 2018. *Available at* https://www.bls.gov/ncs/ebs/benefits/2018/ownership/private/table02a.pdf.

The SEC's Deliberate Approach to Proxy Firm Rulemaking

Manufacturers greeted with enthusiasm the September 2018 withdrawal[3] of two no-action letters issued to ISS and Egan-Jones in 2004, as the letters had entrenched and empowered proxy advisory firms for more than a decade.[4] We also appreciated that the SEC's November 2018 Roundtable on the Proxy Process gathered a diverse group of voices to discuss these important issues. The NAM submitted a comment letter[5] in October 2018 in conjunction with the roundtable and later submitted follow-up comments[6] in March 2019 specifically calling for "targeted reforms and effective oversight" of proxy advisory firms. Subsequently, in August 2019, the Commission issued guidance clarifying that investment advisers have a substantial due diligence requirement when relying on proxy firms,[7] and that the firms themselves are subject to the federal proxy rules.[8]

As we consider the proposed rule, which would build on the last two years' progress by making welcome amendments to the way in which the proxy rules and the exemptions therefrom apply to proxy advisory firms, the NAM applauds the deliberative, iterative process by which the Commission has considered, and ultimately proposed, these important reforms. The breadth and depth of stakeholder input considered (ranging from the 2010 Concept Release on the U.S. Proxy System[9] and the 2013 Roundtable on Proxy Advisory Services to the last two years of feedback and deliberation) provides a strong foundation for the rule proposal, and the proposing release offers justifications for the proposed reforms grounded in the last decade of stakeholder engagement.

If finalized, the proposed rule would represent a significant change in how issuers and investors experience the influence of proxy advisory firms. The firms would still be able to provide research and voting recommendations to their institutional investor clients, filling a market need that the NAM understands and appreciates. However, they would do so with enhanced transparency around their conflicts of interest, methodologies, and sources of information, as well as a new process for issuer engagement that will improve the accuracy and reliability of their recommendations.

The NAM applauds the SEC for proposing a comprehensive rule updating the proxy voting ecosystem. We support the core provisions of the proposal, including the clarification that furnishing proxy voting advice constitutes a solicitation, the amendments to Rule 14a-2(b) conditioning its exemptions on proxy firms disclosing their conflicts of interest and more fulsomely engaging with issuers, and the enhancements to Rule 14a-9's antifraud rules. For reasons discussed in greater

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[3] *Statement Regarding Staff Proxy Advisory Letters*. SEC Division of Investment Management, 13 September 2018. *Available at* https://www.sec.gov/news/public-statement/statement-regarding-staff-proxy-advisory-letters.

[4] As NAM President and CEO Jay Timmons stated when the letters were withdrawn: "For far too long, proxy advisory firms have exerted undue influence over manufacturing companies, trying to force business decisions without any regard to investors' best interests. This is a threat not only to manufacturing growth, but also to the savings of millions of American workers." *See SEC Ruling Puts Manufacturers First* (13 September 2018), *available at* https://www.nam.org/sec-ruling-puts-manufacturers-first-1013/.

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

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

[7] *Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, 84 Fed. Reg. 47420 (10 September 2019). Release Nos. IA-5325; IC-33605, *available at* https://www.sec.gov/rules/interp/2019/ia-5325.pdf.

[8] *Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, 84 Fed. Reg. 47416 (10 September 2019). Release No. 34-86721, *available at* https://www.sec.gov/rules/interp/2019/34-86721.pdf.

[9] *Concept Release on the U.S. Proxy System*, 75 Fed. Reg. 42982 (22 July 2010). Release Nos. 34-62495; IA-3052; IC-29340, *available at* https://www.sec.gov/rules/concept/2010/34-62495.pdf.

detail below, we also would appreciate the Commission's further consideration of amendments to appropriately regulate the practice of automatic vote submission in order to ensure that the reforms reflected in the proposed rule are meaningful and effective. We respectfully urge the Commission to expeditiously issue a final rule that maintains the proposed reforms while also implementing targeted enhancements that we believe would further protect investors and improve the proxy process. If finalized effectively, the proposed rule will bolster capital formation by allowing issuers to grow their business and ultimately generate long-term returns that will enable millions of hard-working Americans to invest for a new home, a child's education, or a secure retirement.

I. Impact of Proxy Advisory Firms

Proxy advisory firms have risen to prominence in the wake of increased institutional ownership of American stocks. According to one recent report, institutional investors now control nearly 80 percent of market value on U.S. exchanges.[10] 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. As a result, proxy advisory firms have enormous influence over the corporate governance policies of U.S. public companies – decisions that impact the direction of a business and the life savings of millions of investors.

To be clear, the NAM does not object to proxy firms playing a role in providing accurate information to the marketplace. To the extent that their relationships with institutional investors result in more fair, balanced, and complete information being made available to the market, thereby enabling these institutions to better serve their Main Street investor clients, the NAM believes that proxy firms can be constructive and provide a useful service. A neutral, fact-based process that results in helpful recommendations presented alongside management proposals can only benefit investors and issuers. However, the current paradigm is far from a neutral, fact-based process, and the recommendations produced are often problematic in a variety of ways. Indeed, the flaws embedded into the business model of proxy advisory firms are at this point well-documented:

- 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, particularly as it relates to environmental, social, and governance (ESG) priorities.

- 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 (unlike the SEC rules with which public companies must comply, which are of course subject to a rigorous notice-and-comment process). In addition, the firms issue specialty reports developed using vague methodologies that depart from their standard benchmark policies.

- Proxy firm reports and recommendations feature a profusion of errors and misleading statements, ranging from specific incorrect facts to disingenuous 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.

- Proxy firms have been steadfastly resistant to engaging in a productive dialogue with issuers to correct errors and misunderstandings; indeed, one of the firms will only engage with

[10] McGrath, Charles. *80% of equity market cap held by institutions*. Pensions & Investments, 25 April 2017. http://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions.

companies in the S&P 500, while another charges issuers a fee to review their draft recommendations.

- 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 their clients out of the process and depriving issuers of a chance to correct the record or provide investors with additional information.

In addition to the flawed process described above, proxy advisory firms also have *prima facie* conflicts of interest. Of the two leading firms in the space, Glass Lewis is owned by an investor that engages in proxy contests, while ISS 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 and ESG ratings provides a strong incentive for companies to purchase consulting services in order to model and predict the impact of ISS's standards – all the while generating revenue for ISS.

Despite this profusion of "red flags," the proposing release notes that the proxy firms' advice "is often an important factor in the[ir] clients' proxy voting decisions"[11] and, in many cases, as mentioned, the firms actually cast proxy votes on their clients' behalf without client interaction or confirmation. This level of influence gives the 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 percent of the shareholder vote[12] – 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.

Proxy advisory firms' significant influence on corporate policies and shareholder voting decisions amplifies the flaws in their business model, including their significant conflicts of interest, errors and methodological mistakes, one-size-fits-all policies, and lack of engagement with issuers. Reform is clearly necessary to protect the life savings of the millions of manufacturing workers whose investments are affected by proxy firms.

II. Proposed Codification of the Commission's Interpretation of "Solicitation" Under Rule 14a-1(l) and Section 14(a)

The significant influence that the proxy firms wield, and their substantial impact on the market, provides clear justification for the proposed rule's codification of the Commission's August 2019 interpretation and guidance, which clarified that the furnishing of proxy voting advice, as practiced by proxy advisory firms, generally constitutes a "solicitation" under Exchange Act Section 14(a).[13] As the proposing relates states:

> *"[A]n overarching purpose of Section 14(a) is to ensure that communications to shareholders about their proxy voting decisions contain materially complete and accurate information. It would be inconsistent with that goal if persons whose business is to offer and sell voting*

[11] Proposing Release, *supra* note 1, at 8.

[12] 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.

[13] August 2019 Interpretation and Guidance, *supra* note 8.

advice broadly to large numbers of shareholders, with the expectation that their advice will factor into shareholders' voting decisions, were beyond the reach of Section 14(a)."[14]

The NAM has consistently called for clarification that proxy firm recommendations constitute a solicitation and thus subject the firms to Rule 14a-9's antifraud provisions and necessitate their reliance on the Rule 14a-2(b) exemptions from the relevant information and filing requirements. In our October 2018 comment letter, we called for "targeted reforms" to the Schedule 14A regulatory regime in order to "ensure that investors are receiving accurate, conflict-free information" from proxy advisory firms.[15] Similarly, in March 2019 we called for "SEC clarification that the furnishing of proxy voting advice as practiced by proxy firms does indeed qualify as proxy solicitation."[16] We applaud the SEC for identifying the impact on investors that proxy firms can have, and we strongly agree that proxy firm recommendations represent the "type of activity that raises the investor protection concerns about inadequate or materially misleading disclosures that Section 14(a) and the Commission's proxy rules are intended to address."[17] As such, we strongly support the proposed rule's clarification that proxy voting advice generally constitutes a solicitation. The proposed rule would place proxy firms and issuers on equal regulatory footing – both would face a mandate to avoid false, misleading, and deceptive communications to investors.

Furthermore, it is abundantly clear that the SEC has the authority to classify proxy voting advice as a solicitation, and that the definition promulgated in the proposed rule is appropriate. Given that the Exchange Act does not provide a specific definition for actions that constitute a solicitation, the Commission has historically, as it proposes to do again in this case, "exercised its rulemaking authority…to define what communications are solicitations and to prescribe rules and regulations when necessary and appropriate to protect investors."[18] In this context, the proposed rule is appropriate and in line with historical updates to the definition.

As the proposing release notes, (i) proxy advisory firms disseminate proxy voting advice that is specific to a registrant's upcoming meeting and generally includes a vote recommendation for each proposal, (ii) proxy firms market this specific expertise and analysis, (iii) proxy firm clients pay for the use of the firms' expertise and analysis, which is specifically relevant to upcoming shareholder meetings, and (iv) the advice is disseminated shortly before the proxy firm clients cast shareholder votes. These are all significant, relevant factors making clear that proxy voting advice is "a communication to security holders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy."[19] The NAM strongly supports the clarification that proxy voting advice generally constitutes a solicitation, and we respectfully urge the SEC to retain the codification of the Commission's recent interpretation and guidance on this topic as the linchpin to any final rule.

Application of the Solicitation Definition

Additionally, the NAM strongly supports the Commission's additional clarifications regarding the types of proxy firm reports and actions that would be classified as a solicitation. Specifically, the proposing release makes clear that each and every voting recommendation offered by a proxy advisory firm would be considered "separate communications of proxy voting advice" and thus fall

[14] Proposing Release, *supra* note 1, at 19.

[15] NAM October 2018 Letter, *supra* note 5, at 5.

[16] NAM March 2019 Letter, *supra* note 6, at 6.

[17] Proposing Release, *supra* note 1, at 17.

[18] *Id.* at 13.

[19] *Id.* at 16.

under the definition of solicitation.[20] This is an important clarification because, as the proposing release notes, proxy firms often use more than one set of guidelines to formulate their voting recommendations, and subsequently disseminate differentiated recommendations based on the distinct sets of guidelines.

Shareholders can subscribe to the benchmark policy guidelines and/or a number of specialty reports related to, for example, sustainability, social, or labor policy. Some proxy firm clients also have custom, tailored policy guidelines prepared in certain circumstances. The proposed rule would, appropriately, classify each of these reports as acts of solicitation. In bringing these reports under Section 14(a), the SEC proposes a comprehensive regulatory regime that would ensure the important reforms included in the proposing release (e.g., the amendments to the exemptions from Section 14(a)'s information and filing requirements that would allow issuers to provide feedback on draft recommendations) apply to all the reports developed by the proxy advisory firms. Given the influence that proxy firm reports outside the benchmark policy can have, the NAM strongly supports clarifying that the proxy firms' benchmark, specialty, and tailored reports, as well as any other proxy voting advice promulgated, are all subject to Schedule 14A.

Furthermore, the proposing release clarifies that the furnishing of proxy voting advice qualifies as a solicitation even if a proxy firm is ultimately indifferent to the result of a given shareholder vote or if a proxy firm client ultimately chooses not to follow a specific vote recommendation. This clarification is key, as the proxy firms have in the past claimed that their supposed indifference to voting outcomes should exempt them from Section 14(a). Ultimately, all proxy firm recommendations are reasonably calculated to result in a proxy voting decision and, as such, all voting recommendations should be clearly within the scope of Section 14(a) even in instances when a proxy firm may be indifferent to the result or a client may choose not to follow the firm's advice.

Proxy Firm ESG Ratings

In addition to the voting recommendations for which the proxy firms are most well-known, they also publish ratings scoring companies' adherence to certain environmental, social, and governance standards. Most notably, ISS offers a range of ESG ratings, including its QualityScore product, that evaluate companies based on certain ESG metrics. Similar ratings are offered by other entities outside of the traditional proxy firm duopoly, including ratings agencies like Sustainalytics, RepRisk, MSCI, and SASB. In manufacturers' experience, these unregulated actors all share a similar methodology: boiling a complex issue (or, often, multiple complex issues) down into a single numerical score or letter grade with little to no disclosure as to how such score or grade is calculated.

As with proxy firm recommendations, these one-size-fits-all ratings do not take into account the individual circumstances of a given company nor provide any context for a company's ESG work outside of the check-the-box approach favored by the ratings firms. Furthermore, it is often unclear to issuers and investors alike exactly what data went into calculating a given rating. Companies report receiving dozens of surveys from proxy ratings agencies asking for information, but it is unclear how and if their responses are utilized and what the impact would be of choosing not to respond to a given survey. As such, management is forced to make a choice between spending time and resources providing information to a black box in the hopes of achieving a "good" score and ignoring the cavalcade of incoming surveys from these unregulated firms and risking a "bad" score.

As the SEC works to finalize the proposed rule's codification of the Commission's interpretation of the definition of solicitation, the NAM would encourage a close look at the increasingly significant role that ESG ratings are having on investment and voting decisions. As the August 2019

[20] *Id.* at 18.

interpretation and guidance notes, the SEC "has previously stated that the federal proxy rules apply to any person seeking to influence the voting of proxies by shareholders, regardless of whether the person itself is seeking authorization to act as a proxy."[21] As with proxy firm recommendations, ESG ratings are clearly designed to influence proxy voting, and manufacturers have found that institutional investors' reliance on these ratings is increasing. The NAM would welcome clarification about the status that ESG ratings have in the updated solicitation regime, as well as appropriate oversight from the SEC on ESG ratings agencies' methodologies, sources of information, and influence on proxy voting decisions.

III. Proposed Amendments to Rule 14a-2(b)

Having clarified that the furnishing of proxy voting advice qualifies as a solicitation under Section 14(a), the proposing release next makes vital reforms that rely on this clarification by amending the Rule 14a-2(b) exemptions from Schedule 14A's filing and information requirements on which the proxy firms rely. The NAM has consistently called for amendments to Rule 14a-2(b) to "ensure that proxy advisory firms furnish advice to institutional investors that is developed with the best interests of Main Street investors in mind."[22] Specifically, we have called for the 14a-2(b) exemptions to "address the key structural flaws endemic to the proxy firms' business model – namely, their one-size-fits-all policies, lack of transparency, propensity for errors, misleading assumptions about key benchmarks like peer groups, lack of dialogue with issuers, problematic robo-voting policies, and significant conflicts of interest."[23]

The NAM agrees with the SEC that "it is unnecessary for [proxy advisory firms] to comply with the filing and information requirements of the proxy rules to the same extent as non-exempt soliciting persons, *provided other measures are in place to protect investors*."[24] As the proposing release notes, concerns have been raised, by the NAM and others, about the firms' conflicts of interest impacting the "objectivity of the proxy voting advice," the "accuracy and material completeness" of the firms' research, and the lack of investor access to "information and views from the registrant" about which the proxy firm is making recommendations.[25] These significant concerns provide a clear justification for the targeted amendments that the SEC has proposed to Rules 14a-2(b)(1) and 14a-2(b)(3), which will allow proxy firms to remain exempt from the filing and information requirements while instituting important measures to protect investors.[26]

Conflicts of Interest

Enhanced Conflicts Disclosures

The conflicts of interest endemic to the proxy advisory firms' business model have given rise to numerous situations in which "the interests of a proxy voting advice business may diverge materially from the interests of investors," as described in the proposing release.[27] The firms' ownership, client

[21] August 2019 Interpretation and Guidance, *supra* note 8, at 5.

[22] NAM March 2019 Letter, *supra* note 6, at 5.

[23] *Id.* at 6.

[24] Proposing Release, *supra* note 1, at 26 (emphasis added).

[25] *Id.*

[26] As the proposing release notes, both exemptions were adopted at a time before proxy advisory firms wielded the influence that they now do, and the firms have historically relied on one or both of the exemptions to avoid Schedule 14A's information and filing requirements. Throughout the proposed rule, the SEC applies any amendments to Rule 14a-2(b) to both the 14a-2(b)(1) and 14a-2(b)(3) exemptions, ensuring that that reforms apply irrespective of which exemption is being utilized. The NAM supports this broad application of the proposed reforms.

[27] Proposing Release, *supra* note 1, at 28.

relationships, and commercial practices all represent significant potential for conflicts of interest. Indeed, proxy firms themselves have recognized this fact – in a June 2018 letter to the Senate Banking Committee, Glass Lewis characterized ISS's business consulting service as "a problematic conflict of interest that goes against the very governance principles that proxy advisors like ourselves advocate."[28] As such, the NAM supports the proposed rule's amendments to Rule 14a-2(b) that would condition the availability of the 14a-2(b)(1) and 14a-2(b)(3) exemptions on robust disclosure of a proxy firm's material conflicts of interest.

Under the rule proposal, a proxy advisory firm relying on the Rule 14a-2(b)(1) and 14a-2(b)(3) exemptions would be required to disclose any material interests the firm has in the matter under consideration or the parties impacted, any material transaction or relationship the firm has with the issuer or shareholder proponent, and any other information about the firm and its relationships that would be material in evaluating its objectivity. The firm would also be required to provide a discussion of the policies and procedures it has in place to identify and address any material conflicts of interest. These proposed conditions to the 14a-2(b)(1) and 14a-2(b)(3) exemptions would promote consistency in proxy firms' conflicts disclosures and give investors vital information about the nature of the firms' conflicts and any steps taken to mitigate them. Accordingly, the NAM strongly supports the proposed conflicts disclosures.

We also applaud the proposing release's detailed discussion of the myriad conflicts that often arise in the proxy firms' ordinary course of business. The release highlights as significant conflicts instances in which the firms provide:

- Both voting advice about and consulting services to a given issuer;
- Voting advice on a matter in which the firm or its clients have a material interest;
- Both ratings of issuers' corporate governance practices and consulting services to help issuers improve said ratings; and
- Voting advice about a given issuer when the firm's affiliates have a relationship with the issuer and/or a shareholder proponent.[29]

The NAM respectfully encourages the SEC to maintain this detailed, instructive list in the final rule, and to codify the broader, more conceptual list from its August 2019 guidance. The guidance emphasizes the importance of proxy firms identifying, disclosing, and addressing any conflicts related to the firms' proxy advice and proxy voting services and those related to other services the firms provide, as well as any conflicts related to the firms' affiliations.[30] Maintaining the examples in the proposed rule and codifying the examples from the August 2019 guidance would validate the issues that companies have experienced with proxy firm conflicts and provide important context for the types of conflicts that A.) could impact investors' reliance on proxy firm recommendations and B.) are appropriate to disclose under the new conflicts disclosure condition to the Rule 14a-2(b)(1) and 14a-2(b)(3) exemptions.

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[28] Glass Lewis Response to U.S. Senate Banking Committee Letter, 1 June 2018. *Available at* https://www.glasslewis.com/wp-content/uploads/2018/06/Glass-Lewis-Response-to-May-9-2018-Chairman-Heller-Letter_0601_FINAL.pdf.

[29] Proposing Release, *supra* note 1, at 27.

[30] August 2019 Guidance, *supra* note 7, at 19.

Form and Function

The NAM supports the SEC's efforts to ensure that the proposed disclosures are sufficiently "specific" and "prominent" and to clarify that disclosures that are "vague or boilerplate" or "do not provide sufficient information about the nature of potential conflicts" would not be adequate under the proposed rule. These clarifications will enable investors to have access to specific, meaningful disclosures about proxy advisory firms' conflicts of interest.

The proposing release solicits comment regarding the importance of including conflicts disclosures in a proxy firm's proxy voting advice and, similarly, whether the disclosures should be included in the same manner if the proxy firm uses a voting platform or other electronic medium to deliver voting advice. The NAM strongly supports the requirement that the proposed conflicts disclosures be included prominently in both the written and electronic reports provided to a proxy firm's clients. The goal of the disclosures is to enable investors to better evaluate the firm's conflicts in the context of the firm's voting recommendations, so presenting the conflicts disclosures in the voting advice report or on the voting platform is vital.

We also appreciate that the proposing release offers specific guidance on steps that proxy firms can take to ensure that their conflicts disclosures are sufficiently detailed, including by disclosing the identities of parties or affiliates involved and the approximate relevant dollar amount; similarly, we strongly support the specific clarification that "[b]oilerplate language that such relationship or interest may or may not exist would be insufficient."[31]

Automatic Vote Submission

The NAM agrees with the Commission that "by requiring proxy voting advice businesses to provide standardized disclosure regarding conflicts of interest, clients of these businesses would be in a better position to evaluate these businesses' ability to manage their conflicts of interest."[32] Given the significant impact that these conflicts can have on the firms' recommendations, and the degree to which manufacturers have experienced their influence, increased transparency is a welcome development.

As the Commission works to finalize the proposed rule, and specifically the condition that proxy firms disclose information about their material conflicts of interest, the NAM strongly encourages the SEC to consider the impact that certain asset managers' reliance on the proxy advisory firms to automatically vote their shares (a practice sometimes known as "robo-voting") would have on the proposed conflicts disclosures.

In the NAM's view, the value of the enhanced disclosures in the proposed rule is that investors are able to review the information about a proxy firm's conflicts of interest alongside its voting recommendations and make an informed decision about whether and how to rely on the firm's advice. If investors' shares are instead robo-voted by the firm, no opportunity for such a review exists, limiting the efficacy of the significant reforms the SEC has proposed. Disclosures designed to better inform investors are of little use if the investor never sees those disclosures before its shares are voted.

Indeed, the proposing release specifically solicits comment on whether the proposed disclosures would provide investors with adequate and appropriate information about proxy firm conflicts of interest "when making their voting determinations."[33] Unfortunately, instances in which asset

[31] Proposing Release, *supra* note 1, at 32.

[32] *Id.* at 34.

[33] *Id.* at 35.

managers are not making proactive voting determinations would significantly limit the utility of the proposed conflicts disclosures. The NAM supports an additional amendment to the Rule 14a-2(b) exemptions to limit the automatic submission of proxy votes in the event of a contested recommendation.[34]

Registrants' and Other Soliciting Persons' Review of Proxy Voting Advice and Response

As a general rule, issuers are not given sufficient time to review the draft recommendations that proxy firms make about their business. (As we have noted, companies outside the S&P 500 are usually given no such opportunity at all.) When issuers attempt to utilize the limited time they receive for review, they have found the proxy firms to be difficult to reach and disinclined to make changes that would result in a more accurate report for investors. Furthermore, the firms issue their reports so close to the issuer's annual meeting that direct communication with shareholders to correct proxy firm errors or misrepresentations is difficult (via a supplemental proxy statement or elsewise), and persistent robo-voting undercuts even that limited opportunity.

As the NAM has stated in the past, proxy firms' unwillingness to engage with the issuers on which they are conducting research and making recommendations compounds the many problems that manufacturers face when dealing with the firms. Errors, methodological weaknesses, and one-size-fits-all policy guidelines are damaging enough, but the firms' reluctance to fix mistakes or hear another side of the story ensures that these flaws persist throughout the drafting process and may ultimately taint the final voting advice. (These issues are further exacerbated when a proxy advisory firm robo-votes a client's shares. In such instances, the asset manager does not have the opportunity to review the report for itself, foreclosing the opportunity for it to identify a mistake or consider an issuer perspective that the proxy firm might have ignored.)

The NAM has called for amendments to Rule 14a-2(b) to condition the Rule's exemptions on a requirement that proxy advisory firms A.) "allow all issuers, not just the largest companies, access to draft recommendations," B.) "give issuers sufficient time to review draft recommendations," and C.) "include an issuer's dissenting opinion…in the firm's report."[35] As such, the NAM strongly supports the proposed rule's amendments to Rule 14a-2(b) to create a new issuer review and feedback process and allow issuers to submit a statement to be included in the final report via hyperlink. As the proposing release notes, these two new processes would reduce the likelihood of errors, provide investors with more complete information, and improve the reliability of proxy voting advice.

Issuer Review and Feedback

The NAM has previously called for a period of five business days for impacted businesses to review and provide feedback on draft proxy firm recommendations. This opportunity would greatly enhance the quality and accuracy of proxy firm recommendations by allowing issuers to flag mistakes and help proxy firms understand the relevant aspects of their business. A proxy firm would be under no pressure to accept any edits or make any changes proposed by the issuer; rather, such a process would encourage a healthy dialogue that improves the quality of the voting advice ultimately furnished to investors.

Under the proposed rule, issuers would be guaranteed five days for review provided they file their definitive proxy statement at least 45 days in advance of their annual meeting. The NAM supports this reasonable, commonsense condition. The NAM also supports maintaining the alternative

[34] Specifically, we support conditioning the availability of the Rule 14a-2(b)(1) and 14a-2(b)(3) exemptions on a proxy firm disabling the automatic submission of votes when an issuer has provided a statement in response to the firm's voting advice. *See infra* at 15 for further discussion.

[35] NAM March 2019 Letter, *supra* note 6, at 6.

timeline wherein issuers that file their definitive proxy statement less than 45 days, but more than 25 days, in advance of their annual meeting are guaranteed three days for review.

The proposing release solicits comment on the impact the proposed timeframes would have on issuers, proxy firms, and investors. The NAM is sensitive to the timing pressures intrinsic to a busy proxy season, and we support the SEC's goal of "allowing more time for proxy voting advice businesses and their clients to formulate and consider voting recommendations."[36] In our view, the proposed filing deadlines and review windows appropriately balance these timing considerations with the ability of businesses to provide useful feedback on draft proxy firm reports – which will benefit issuers, proxy firms, and investors alike by improving the quality and accuracy of the firms' recommendations.

With regard to the proposing release's specific timing questions, the NAM believes that five days is sufficient for companies to adequately review and provide useful feedback on draft proxy firm recommendations. During a busy proxy season, companies will benefit from a standardized timeline that allows for comprehensive review and response. Three days remains a viable "back up" option – unnecessarily short were it to be applied to issuers giving 45-day notice before their annual meeting, but sufficient for companies that do not to meet the 45-day deadline but still file at least 25 days before their annual meeting.

The proposing release also solicits comment on whether the proposed review and feedback period would impede the proxy firms' ability to deliver voting advice to their clients in a timely manner. The NAM believes that it is extraordinarily unlikely that the proposed processes would lead to damaging delays. Given that it is in issuers' best interests to respond to proxy firm errors or methodological weaknesses promptly, and to have annual meetings conducted on time and with a quorum, issuers will always be incentivized to complete their review in a timely fashion. Ultimately, the proposed review windows (five days out of 45, or three days out of 25) represent a small share of the full time that a proxy firm has to develop its recommendations. Additionally, issuers that file their definitive proxy statement less than 25 days before their annual meeting would be given no opportunity to provide feedback on the draft recommendations at all. This tiered framework will help ensure that issuers' and proxy firms' work can be completed and delivered to investors in advance of the annual meeting. Accordingly, the NAM does not believe that the proposed review and feedback process will impede the proxy firms' ability to meet the deadlines of proxy season.

Final Notice of Voting Advice and Issuer Response Statement

In addition to the review and feedback process that would take place as a proxy firm's report is being drafted, the proposed rule would also condition the Rule 14a-2(b)(1) and 14a-2(b)(3) exemptions on a proxy firm providing issuers with a "final notice of voting advice" and allowing issuers to see the final version of the report in the two days before it is published so they can submit a response statement to be included in the final report as a hyperlink. The NAM has been clear that the inclusion of a "dissenting opinion" from the company's perspective is a vital component of any issuer engagement reforms to the proxy advice process. We believe that Main Street investors can only benefit from their asset managers having an issuer statement on hand to compare with the proxy firm recommendation in order to make an informed voting decision.

As we have said, under the current process issuers have little ability to communicate to their investors a response to proxy firm recommendations. Some companies choose to file a supplemental proxy statement with the SEC, but the proxy firms typically publish their reports too close to the annual meeting for such a response to be effective. Moreover, robo-voting entirely eliminates investors' ability to review any supplemental information. Allowing companies to submit a

[36] Proposing Release, *supra* note 1, at 46.

response statement in the final two days[37] before a proxy firm report is published would give investors a key data point as they are considering their final voting decisions, and the NAM applauds the SEC for proposing just such a process.

The proposing release solicits comment on whether there are better methods than a hyperlink for proxy firms to share issuer response statements with their clients, and notes that the Commission considered including in the rule proposal a condition that proxy firms "include a full written statement from the registrant in the proxy voting advice delivered to clients."[38] While the proposed hyperlink is certainly a strong step in the right direction, the NAM respectfully encourages the SEC to condition the Rule 14a-2(b)(1) and 14a-2(b)(3) exemptions on a proxy firm allowing a full written statement from the issuer to be included in the final proxy firm report. The core benefit of the issuer response statement is in the ability for investors to review it side-by-side with the proxy firm recommendation; a hyperlink would make direct comparison more difficult and limit the statement's utility. Moreover, for investors that receive proxy firm materials by mail, or otherwise review the recommendations in a paper format, the hyperlink would be effectively useless.

Given the proposed rule's assurance that proxy advisory firms would not be liable for the content of the issuer's response statement (a provision that the NAM supports), there is no reason that the firms should be unable to include a full issuer statement in the text of the report. The proposing release offers formatting as a potential roadblock, but it is the NAM's view that a proxy firm could include a simple blank page in its report into which the issuer response statement(s) could be inserted (alongside the relevant proxy firm recommendation(s)), offset by disclaimers from the proxy firm that it does not endorse nor accept liability for the issuer statement. Such a simple solution would increase the chance that asset managers review the response statement and ultimately lead to more-informed voting decisions being made on Main Street investors' behalf.

First Amendment Concerns

It is worth noting that the NAM does not believe that conditioning the Rule 14a-2(b) exemptions on the inclusion of a link to an issuer response statement (or on the inclusion of the statement itself) raises any concerns with respect to the proxy firms' free speech rights under the First Amendment. The proposed reform is not a requirement in and of itself, but rather a condition to an exemption upon which the proxy firms choose to rely. It is therefore not "compelled speech."

In the context of the broad, investor-focused disclosure regime at issue, the proposed response statement does not pose a constitutional issue any more than issuers' mandated quarterly filings or corporate proxy statements that include proposals from shareholder proponents. The goal of these disclosures is to provide important information to investors – also the stated goal of the issuer response statement condition. As such, the inclusion in a proxy firm's report of a hyperlink and/or an issuer response statement is not an exercise of the firms' speech rights at all (especially given that the proposing release is clear that proxy firms are free to disclaim any liability for the content of the

[37] The proposing release solicits comment on the impact of the two-day timeframe for issuer review of and response to the final proxy firm report. From the issuer point of view, we believe two days is sufficient to develop and submit a response statement, especially given that most issuers will have already seen a draft copy of the recommendation and begun preparing their response statement. With regard to the two-day window's overall effect on the timeline of proxy season and the proxy firms' ability to deliver recommendations to clients in a timely manner, we would contend that the impact will be minimal. As stated above, the proposed window is a small slice of proxy season as a whole – and, in the case of the response statement, a proxy firm would not have to conduct any follow-up upon receipt other than to insert a hyperlink to the statement in its report (or, as in the NAM's proposal, insert the statement itself – either way, a simple administrative act).

[38] Proposing Release, *supra* note 1, at 54. (Such a condition is also included as a "Reasonable Alternative" at 113).

statement), but rather a simple administrative act akin to other filings that support the flow of information in America's capital markets.[39]

However, if the Commission chooses to make the issuer response statement condition optional on First Amendment grounds, the NAM would strongly suggest subjecting a proxy firm's decision to omit an issuer response statement to antifraud liability under Rule 14a-9. The disclosures under Rule 14a-9, discussed in more detail below, are designed to ensure that solicitations do not contain false or misleading statements, *nor omit to state any material information* that would be necessary to make any statement not false or misleading. An issuer's response to a contested proxy recommendation would clearly be material to a shareholder's proxy vote decision, so a proxy firm claiming First Amendment protections in order to choose to omit such a response should be subject to Rule 14a-9 antifraud scrutiny for that decision.

Application of the Proposed Issuer Feedback and Response Processes

The proposing release solicits comment on a number of questions related to the applicability of both the issuer review/feedback process and the final notice of voting advice/issuer response statement process. Under the framework proposed by the SEC, proxy advisory firms would not be required to incorporate any feedback provided during the review and feedback process, nor accept liability for the issuer response statement submitted following the final notice of voting advice. As such, the NAM sees no justification for limits on the recommendations, topics, proposals, or content that would be included in either proposed process. Any such limitations would undercut standardization and predictability for issuers, proxy firms, and investors alike. Several restrictions, if adopted, would be particularly harmful to shareholders:

- **Limitations based on subject matter:** No topics nor kinds of proposals should be excluded from the review/feedback and final notice of voting advice/issuer response statement processes. Putting proxy firms in the position of regulator and allowing them to exclude issuer responses from consideration based on amorphous criteria cuts against the spirit of the rule proposal – which is to say, making proxy firms less like quasi-regulators and more like regulated market actors. Issuers can accept the responsibility of determining what feedback they think will provide useful information to their investors, and ultimately the market will decide what topics and proposals benefit most from enhanced issuer-proxy firm dialogue. Specifically, the NAM would strongly oppose any guideline or restriction to limit either process to just "disagreements on facts used to formulate the proxy voting advice"[40] given that A.) such a limitation would allow proxy firms to determine what they consider to be factual and B.) the purpose of both processes is to provide investors with more information across-the-board to make an informed voting decision.

- **Limitations based on proxy firm recommendation:** The review/feedback and final notice of voting advice/issuer response statement processes should not be limited only to instances in which a proxy advisory firm has issued an adverse recommendation. While those instances are obviously likely to generate the most issuer engagement, there is no reason to remove the ability of issuers to provide additional context on any recommendation in an effort

[39] Courts are further likely to uphold the proposed condition because compelled speech cases almost uniformly involve a business being forced to speak out against its own product or service. *See, e.g.*, *American Beverage Association v. City and County of San Francisco*, 916 F.3d 749 (9th Cir. 2019). Here, by contrast, the relevant information pertains to the business or actions of the issuer rather than the proxy advisory firm. Proxy firms are not being compelled to speak about their own business; rather, they are voluntarily speaking about an issuer's business and would simply need to provide an opportunity for the issuer to respond in order to avail themselves of the 14a-2(b) exemptions.

[40] Proposing Release, *supra* note 1, at 65.

to increase the amount of information available to investors. Also, as stated above, allowing proxy advisory firms to make a determination about whether their recommendation was sufficiently "adverse" puts them in a position of power that cuts against the spirit of the rule proposal. The uncertainty inherent in making such a categorial determination would, again, put the proxy firm in the role of regulator.

- **Limitations based on issuer participation in the review process:** The condition that proxy firms issue a final notice of voting advice and the ability for issuers to submit a response statement should not be limited only to issuers that previously participated in the review and feedback process. There are numerous reasons why an issuer might not provide comments during the review window (including issuers that file their proxy statement after the 25-day deadline and are thus ineligible to participate) that in no way undercut the effectiveness and importance of the proposed issuer response statement condition. All issuers should have the opportunity to submit a response statement for inclusion in the final proxy voting advice furnished to proxy firm clients, irrespective of whether and how they participated in the review and feedback process.

- **Limitations based on the content of issuer responses:** Given that the proposed rule specifically clarifies that proxy firms need not accept liability for the content of an issuer's response statement, there should be no restrictions on what content can be included in the hyperlinked (or, as the NAM proposes, inserted) statement. Similarly, given that proxy firms do not have to accept proposed changes during the review and feedback process, no topics should be off-limits for discussion during the five- and three-day review windows.

- **Limitations based on report type:** The review/feedback and final notice of voting advice/issuer response statement processes should not be limited just to proxy advisory firms' benchmark policy reports. As we have discussed, proxy firms offer numerous specialty reports to clients, each of which has the same potential as the benchmark report for errors, methodological weaknesses, and one-size-fits-all policies.[41] Given the investor impact that each of these reports can have, they should all be incorporated into the new feedback processes included in the proposed rule.

Additionally, proxy advisory firms should not be permitted to seek reimbursement from companies for participating in the review/feedback and final notice of voting advice/issuer response statement processes. Any sort of pay-to-play requirement would undercut the independence and impartiality of the proposed processes, raise significant conflict of interest concerns, and disproportionately burden smaller issuers. The NAM would strongly oppose giving proxy firms the ability to charge issuers to participate in the new review processes. Rather, we continue to support the proposed rule's standardized approach, which is designed to appropriately incorporate issuer feedback for the ultimate benefit of the investors who rely on accurate, comprehensive information to guide their proxy votes.

<u>Influence on the Independence of Proxy Voting Advice</u>

The proposing release solicits comment on whether the proposed issuer review/feedback process and the final notice of voting advice/issuer response statement process raise any concerns about "possible influencing of the proxy voting advice by the reviewing parties"[42] and how the

[41] We urge the Commission to consider that specialty reports may in fact be *more* susceptible to these issues given that under the current paradigm no companies have an opportunity to review them (unlike benchmark policy reports, which companies in the S&P 500 are at least afforded a limited chance to review). Moreover, specialty reports are by their nature one-size-fits-all.

[42] Proposing Release, *supra* note 1, at 61.

"independence of the advice [could] be called into question if other parties reviewed and commented on it."[43] The NAM believes there is no risk of the proxy advisory firms' independence being threatened by the proposed reforms.

First and foremost, the proposing release makes crystal clear that the ability for companies to suggest changes to a recommendation or the data upon which it is based "does not require proxy voting advice businesses to accept any such suggested revisions."[44,45] And the issuer response statement is submitted after a proxy firm report has been finalized; the proxy firm's only obligation is to include the text, or a link thereto, in the version of the report disseminated to clients. The issuer feedback would exist to point out mistakes or offer alternative perspectives – which could be freely set aside if and when a proxy firm believes its facts, or its interpretation thereof, are unassailable.

Furthermore, it is clear that the proxy firms themselves do not view issuer review as a threat to their independence. ISS has long offered limited review of draft recommendations to members of the S&P 500, while Glass Lewis has done the same for a fee. Additionally, Glass Lewis recently launched a pilot program that would allow issuers to pay to submit a "report feedback statement" similar to the SEC's proposed issuer response statement. The SEC's proposed rule would simply enhance and standardize these limited feedback mechanisms already offered by the firms, not threaten their independence.

<u>Automatic Vote Submission</u>

The proposing release solicits comment on whether the Commission should "amend Rules 14a-2(b)(1) and 14a-2(b)(3) so that the availability of the exemptions is conditioned on a proxy voting advice business structuring its electronic voting platform to disable the automatic submission of votes in instances where a registrant has submitted a response to the voting advice."[46] The NAM would strongly support such a limitation.

As with the proposed conflicts disclosures, the value of the issuer response statement is that investors are able to review the statement alongside the proxy firm's voting recommendation and utilize both perspectives to make an informed voting decision. If an asset manager allows the proxy advisory firm to automatically vote its shares (which are in actuality the shares of the Main Street investors the asset manager represents), then no opportunity for such a review exists. The NAM strongly supports the proposed rule's intent to create an opportunity for issuer feedback and allow issuers to submit a response statement, but the continued prevalence of automatic voting would undermine these welcome reforms.

The proposing release appears sensitive to this concern, soliciting comment on whether investors are "likely to review a registrant's response to voting advice" when a proxy firm provides voting execution services.[47] Unfortunately, the NAM believes that asset managers relying on robo-voting will not conduct such a review. If an asset manager enables automatic submission of all of its votes – including on contested and controversial issues – then its ability to review issuer response statements and make a proactive decision on these important matters is effectively nullified.

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[43] *Id.* at 62.

[44] *Id.* at 51.

[45] The NAM has always been consistent on this point, specifically pointing out in our March 2019 comment letter that "proxy firms would be under no obligation to modify any recommendation" under our proposed reforms. *See* NAM March 2019 Letter, *supra* note 6, at 6.

[46] Proposing Release, *supra* note 1, at 66.

[47] *Id.*

The proposing release offers a number of suggestions to address this problem; the NAM believes the simplest and most effective would be to condition the 14a-2(b) exemptions on proxy advisory firms disabling the automatic submission of votes if a company submits an issuer response statement under the proposed rule's final notice of voting advice process.[48] Automatically submitted votes remove the asset manager from the process entirely, negating the possibility of an affirmative decision on behalf of the retail investors and pensioners they represent. In the context of the proposed rule, automatically submitted votes also effectively negate the new conflicts disclosures and issuer response statements by creating a ready vehicle for the casting of votes without investor review of the newly mandated disclosures.

The guidance released by the Commission in August 2019 regarding the proxy voting responsibilities of investment advisers addresses this important topic. The guidance encourages institutional investors to consider whether certain voting decisions "may necessitate…a more detailed analysis" than a rote application of a proxy firm's guidelines (even if the guidelines are tailored to the specific institution).[49] In instances where the matter under consideration is "highly contested or controversial"[50] or where "factors particular to the issuer"[51] are at play, the guidance suggests "a higher degree of analysis" to ensure the asset manager is representing its investors' best interests effectively.[52]

The NAM believes that the August 2019 guidance sets an appropriate standard in the context of the proposing release's request for comment on whether, when, and how automatic voting should be disabled. The NAM believes that instances in which an issuer has submitted a response statement clearly meet the guidance's standards for contested or controversial matters and matters that require issuer-specific information – both of which require greater analysis on the part of the asset manager. As such, the NAM supports disabling the automatic submission of votes in these cases as a condition of the Rule 14a-2(b) exemptions.[53]

To be clear, the NAM does not take issue with automatic voting on non-contested proposals, including instances in which non-contested and contested proposals appear on a single proxy ballot. For example, we believe it would be permissible for a proxy advisory firm to automatically vote on an asset manager's behalf in an instance in which an issuer ballot had four non-contested proposals and one contested proposal – the four votes could be cast automatically, with only the fifth requiring a proactive choice on the part of the asset manager. In such a case, the proxy firm could pre-populate the fifth vote but not cast it until the asset manager affirms or changes the pre-populated choice; alternatively, the firm could pre-populate a "blank" default vote (of either "abstain" or "do not vote") and allow the asset manager to "fill in" with an affirmative "yes" or "no" decision. Either approach (or other, similar approaches also within the proxy firms' existing voting infrastructure) would be a no-cost step for both the proxy firm and the asset manager, requiring only that

[48] It is worth noting that the NAM does not believe that such a prohibition need apply to proxy firms' pre-population services. In our view, pre-populated votes that still require a proactive asset manager decision to actually cast them pose much less of an investor protection threat than automatic submission – while still easing the voting process significantly, especially for smaller asset managers.

[49] August 2019 Guidance, *supra* note 7, at 14.

[50] *Id.* at 16.

[51] *Id.* at 14.

[52] *Id.* at 16.

[53] As stated previously, we see no need to apply such a prohibition to the proxy firm's pre-population services. It is also important to note that asset managers would, in all cases, retain the right and ability to disagree with management and vote in line with the proxy firm's recommendation. Limiting automatic voting would simply improve the quality of information available in advance of that vote and ensure that the institutional investor is making a proactive voting decision.

institutional investors take the single, simple step of affirmatively making a voting decision for the benefit of the Main Street investors they represent.

Importantly, we do not believe that limiting automatic voting will deter investors from submitting votes. Most proxy ballot measures are non-controversial and would be unlikely to result in a negative proxy firm recommendation and corresponding issuer response statement. Furthermore, the contested matters that do generate a response statement and a prohibition on robo-voting are the most public, most controversial, and most likely to grab investors' attention. Of course, these are the very issues that would most benefit from specific asset manager analysis and proactive decision-making. A targeted prohibition on robo-voting in these limited instances would not dissuade investors from casting proxy votes, nor would it threaten our companies' quorum requirements.[54]

In addition to soliciting comment on automatic voting in the context of the issuer response statement process, the proposing release also includes a description of the potential robo-voting-centric reforms to Rules 14a-2(b)(1) and 14a-2(b)(3) as a "Reasonable Alternative" to the proposed changes, noting that "disabling…automatic submission of votes where registrants or other soliciting persons have submitted responses to voting advice could benefit these parties to the extent that it increases the likelihood that clients of proxy voting advice businesses would review their responses."[55] The NAM certainly believes that the robo-voting limitation under consideration is "reasonable," and we strongly agree that it would increase the likelihood that issuer response statements are actually read and analyzed by asset managers. Such an outcome would not just benefit issuers, however – it would ultimately protect the investors that rely on asset managers' due diligence in managing their retirement savings.

By increasing the likelihood that asset managers review the proposed conflicts disclosures and issuer response statements, a limitation on automatic voting would enhance the efficacy of the proposed rule itself. The rule is premised in large part on the belief, with which the NAM agrees, that making more information available to asset managers via proxy firm reports will ultimately lead to better voting decisions for the benefit of America's Main Street investors. A targeted limitation on automatic voting that ensures that asset managers actually review the new information made available to them by the proposal – particularly in contested and controversial cases – would significantly strengthen the proposed rule's investor protections.

IV. Proposed Amendments to Rule 14a-9

As the proposing release notes, the SEC issued an interpretation and guidance in August 2019 stating that "[a]ny person engaged in a solicitation through proxy voting advice must not make materially false or misleading statements or omit material facts, such as information underlying the basis of its advice or which would affect its analysis and judgments, that would be required to make the advice not misleading."[56] The guidance builds on Rule 14a-9's existing antifraud provisions, illustrating how they apply to proxy advisory firms given that the guidance clarifies that the furnishing of proxy voting advice constitutes a solicitation (a clarification that the proposed rule codifies and which, as discussed above, the NAM strongly supports). Notably, the prohibition on making false and misleading statements (and/or omitting material facts necessary to make a statement not false or misleading) applies to *any* soliciting entity, even those that are exempt from Schedule 14A's

[54] The proposing release solicits comment on the potential impact of disabling automatic voting on an issuer's ability to achieve quorum for an annual meeting. The NAM does not expect such a problem to arise and continues to strongly support a targeted robo-voting restriction when an issuer has submitted a response statement.

[55] Proposing Release, *supra* note 1, at 116.

[56] August 2019 Interpretation and Guidance, *supra* note 8, at 12.

information and filing requirements under the Rule 14a-2(b)(1) and 14a-2(b)(3) exemptions (i.e., proxy advisory firms).

The NAM agrees with the proposing release that "subjecting proxy voting advice businesses to the same antifraud standard as registrants and other persons engaged in soliciting activities is appropriate in the public interest and for the protection of investors."[57] Furthermore, we appreciate that the proposed rule would provide helpful guidelines to proxy advisory firms, clarifying what information they may need to disclose in order to avoid violating the antifraud rules. These enhanced disclosures will provide useful data to the market, and further improve the quality of information available to investors relying upon proxy voting advice to shape their vote decisions.

The proposed rule would add to Rule 14a-9 several examples of disclosures that proxy advisory firms would generally need to provide in order for their statements not to be misleading. Specifically, the firms would need to disclose information about their methodology, sources of information, and conflicts of interests. As we have noted, these issues form the core of the flaws endemic to proxy advisory firm's current practices. Requiring fulsome disclosure of information related to these topics under Rule 14a-9 would shine a light on these problematic practices and hopefully incentivize the proxy firms to make needed reforms to their business model.[58] The NAM strongly supports these proposed disclosures.[59]

Private Right of Action

Moreover, the NAM would support a final rule that provides a private right of action for issuers to enforce the antifraud provisions in the amended Rule 14a-9. Given the impact that the firms' recommendations can have on company policies and shareholder value, it seems only appropriate for the impacted parties to have a right to file suit to seek redress for a false or misleading statement under Rule 14a-9. The proposing release notes that a proxy firm's failure to comply with the new conditions of the Rule 14a-2(b) exemptions would not create a private right of action, but in the NAM's view a violation of the Rule 14a-9 antifraud provisions would represent a more appropriate basis for legal action.

Voting Recommendations that Materially Differ from SEC Standards

The NAM greatly appreciates the proposing release's discussion of instances in which proxy advisory firms make negative voting recommendations based on standards that may not align with SEC requirements. Manufacturers have experienced time and again the exact fact pattern described in the proposing release: receiving a negative vote recommendation despite being in full compliance with the relevant SEC standard. In such cases, the proxy firms are put into the position of acting as quasi-regulators, without the transparency and administrative safeguards that accompany Commission rulemaking.[60] A proxy firm presenting its guidelines as a substitute for SEC

[57] Proposing Release, *supra* note 1, at 68.

[58] As an example, fulsome disclosure of a firm's methodology could include a description of how and why the firm arrived at its evaluation of key metrics like peer groups or disclosed compensation and an explanation of any significant discrepancies between the firm's understanding of an issue and the company's.

[59] We would also support enhancing the list of disclosures the firms would generally need to provide in order to avoid disseminating a misleading statement to include specific disclosures around instances in which proxy firm recommendations are not seeking to maximize shareholder value. In such instances, investors would benefit from a fuller understanding of the firm's motivations and rationale in offering such a recommendation given that proxy firms do not have an ownership stake that could be at risk if their recommendations unrelated to shareholder value creation are ultimately adopted.

[60] They also lack, of course, any statutory authority to enforce their standards – yet they are often successful in forcing companies to make their preferred changes.

requirements without clearly conveying the differences between the two raises the significant likelihood of investor confusion. Under the auspices of Rule 14a-9, such an omission clearly qualifies as a misleading statement, which the proposing release rightly points out. The NAM strongly supports the proposed rule's addition to Rule 14a-9 a clarification that "the failure to disclose the use of standards or requirements that materially differ from relevant standards or requirements that the Commission sets or approves" would be misleading under the Rule.[61]

The proposing release solicits comment on whether Rule 14a-9 should refer to standards or requirements beyond those promulgated by the Commission. The NAM respectfully encourages the SEC to broaden the scope of the rule proposal to include any relevant law or regulation to which the issuer is subject. Manufacturers have experienced proxy advisory firms insisting upon benchmarks in excess of other national standards (e.g., accounting rules promulgated by the FASB) as well as state securities law; in these instances, as with SEC standards, investors would benefit from the knowledge that the companies in which they hold shares are in fact in full compliance with the relevant laws and regulations.[62] We would also support a separate-but-related requirement that proxy advisory firms note when a given recommendation diverges from their own published guidelines – a distinct legal question, obviously, but a similar fact pattern given that investors often make decisions based on, and companies often take steps to structure their policies to be in compliance with, the firms' voting benchmarks only to see a conflicting recommendation.

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The NAM applauds the SEC for proposing a rule to reform the proxy solicitation rules and institute targeted oversight of and reforms to the practices of proxy advisory firms. Manufacturers support the proposed rule, and we encourage the Commission to expeditiously take steps to finalize it following a comprehensive review of the comments received in response to the proposing release, including our suggested enhancements to the rule proposal. A final rule that addresses proxy firms' conflicts of interests, lack of dialogue with issuers, and robo-voting practices will go a long way toward reining in the firms' outsized influence and ultimately protecting the everyday investors whose shares are voted based on their advice.

On behalf of the NAM and the 13 million men and women who make things in America, thank you for your attention to these concerns.

Sincerely,

Chris Netram
Vice President, Tax & Domestic Economic Policy

[61] Proposing Release, *supra* note 1, at 72.

[62] The NAM agrees with the SEC that there is no need to limit proxy firms' freedom to adopt and subsequently make recommendations based upon standards or criteria that diverge from SEC policies, nor those of other regulating entities. We simply ask for transparency when such standards are set.