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Vice President,
Tax and Domestic Economic Policy

February 3, 2020

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

Re: File No. S7-23-19: *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*

Dear Ms. Countryman:

The National Association of Manufacturers appreciates the opportunity to provide comments to the Securities and Exchange Commission on File No. S7-23-19, *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*.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.

We are encouraged that the SEC's recent proposal would make targeted changes to the rules governing shareholder access to the proxy ballot that will center the proxy conversation on the needs of long-term shareholders and ensure that issuers and investors can focus their attention on the vital issues that drive long-term value creation.

¹ *Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8*, 84 Fed. Reg. 66458 (4 December 2019). Release No. 34-87458, available at <https://www.sec.gov/rules/proposed/2019/34-87458.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>.

Manufacturers Value Productive Shareholder Engagement

In the lead-up to the SEC's November 2018 Roundtable on the Proxy Process, the NAM submitted a comment letter calling for reforms to the process by which shareholders qualify proposals for inclusion on an issuer's proxy ballot in order to "protect the integrity of the proxy ballot and preserve the right of investors to engage with management on important corporate governance issues while limiting the impact of activists with political agendas."³ We applaud the SEC for proposing such reforms, and we support the proposed rule.

NAM members value a constructive dialogue with shareholders. Manufacturers expend significant effort conducting outreach to investors about the direction of their businesses, and they strive to structure corporate governance policies to the benefit of long-term shareholder value creation. Yet despite these good faith efforts on the part of issuers and the vast majority of investors, the proxy process has in recent years been hijacked by activists that seek to force companies to act according to their own narrow interests rather than the good of the business or long-term investor returns. In many instances, these third parties take the form of activists pursuing their own goals unrelated to business growth and the corresponding capital investments, R&D spending, and value creation that come with it.

Irrespective of the goals of any individual activist, it remains the case that the thresholds for submitting and resubmitting shareholder proposals are sufficiently low under Rule 14a-8 that shareholder voices can too-easily be drowned out by third parties with little-to-no stake in a company. The NAM appreciates and supports the reforms proposed by the SEC to re-center the conversation on the long-term interests of shareholders.

I. Submission of Shareholder Proposals

Eligibility Requirements under Rule 14a-8(b)

The current ownership and holding period requirements in Rule 14a-8(b) allow for access to the proxy ballot for any shareholder that has held \$2,000 worth of stock for a single year. The NAM strongly agrees with the proposing release that "the \$2,000/one-year threshold established in 1998 does not strike the appropriate balance today."⁴ These thresholds have given rise to so-called "corporate gadflies" who spam company proxy ballots by taking *de minimis* positions in a wide range of issuers so as to qualify their favored proposals on dozens of company proxy ballots. Indeed, in 2017 fully 25 percent of all shareholder proposals were sponsored by just three investors and their families.⁵

The proposed rule would make targeted changes to the holding requirements under Rule 14a-8 to increase the likelihood that shareholder proposals are being offered by individuals who "demonstrate enough of a meaningful economic stake or investment interest in a company"⁶ in an effort to ensure that proposals are advanced as a means of increasing the value of the company and, thus, one's own investment – not "an intention to use the company and the proxy process to promote a personal interest or publicize a general cause."⁷ Specifically, the proposed rule would implement a tiered

³ NAM Comments on File No. 4-725, 30 October 2018. Available at <https://www.sec.gov/comments/4-725/4725-4581799-176285.pdf>.

⁴ Proposing Release, *supra* note 1, at 19.

⁵ Copland, James R. and Margaret M. O'Keefe. *Proxy Monitor 2017: Season Review*. November 2017. Available at http://www.proxymonitor.org/Forms/pmr_15.aspx.

⁶ Proposing Release, *supra* note 1, at 19.

⁷ *Id.* at 20.

approach, granting shareholders eligibility to submit a ballot proposal if they have continuously held \$2,000 worth of issuer securities for three years, \$15,000 for two years, or \$25,000 for one year.

By increasing the one-year holding threshold to \$25,000, the proposed rule would deter corporate gadflies from taking small stock positions only to access the proxy ballot while still allowing shareholders to submit proposals by owning a relatively small share of company stock.⁸ At the other end of the spectrum, maintaining eligibility for individuals that meet the existing \$2,000 holding requirement as long as they hold stock for at least three years would continue to bring the smallest shareholders into the proxy conversation when they are invested for the long term. The NAM applauds the commonsense approach advanced by the proposed rule, and we support the thresholds as proposed.⁹

We also support the SEC's clarification that shareholders would not be able to aggregate holdings to meet the ownership thresholds necessary to submit a proposal. Allowing aggregation would undercut the proposed reforms, which are designed to ensure that each shareholder placing a proposal on a company's proxy ballot has a sufficient economic stake or investment interest in the company. However, we continue to support the ability of individuals to co-file or co-sponsor shareholder proposals as a group provided that each individual qualifies under one of the proposed eligibility tiers.

The proposing release solicits comment on whether the SEC should require shareholders that co-file or co-sponsor a proposal to name a "lead filer" to act as the primary point of contact and negotiate on behalf of the group. We agree with the SEC that enabling a company to negotiate with a single lead on behalf of the group "could facilitate engagement and reduce administrative burdens"¹⁰ and, as such, we would support such a requirement.

Procedural Reforms

The proposed rule would make a number of procedural reforms that, in the NAM's view, would build on the proposed submission threshold reforms by further prioritizing shareholders with a legitimate investment interest, enhancing shareholder-management dialogue, and streamlining the proxy process. The NAM supports these important reforms:

- **Shareholder Documentation:** In instances in which a shareholder uses a representative to submit a proposal on their behalf, the proposed rule would require the shareholder to provide documentation that the shareholder affirmatively supports the proposal in question and that the representative has authority to act on their behalf. This change would, as the proposing release notes, limit instances in which proposals are offered that are "primarily of interest to the representative, with only an acquiescent interest by the shareholder."¹¹ By focusing submission on the interests of actual shareholders rather than their representatives, the proposed reform would increase the likelihood that proposals are drafted so as to enhance long-term returns for investors.

⁸ The proposing release notes that the \$25,000 threshold represents 0.0164 percent of the market value of the 3,000th largest company in the Russell 3000 Index. The share represented by a \$25,000 holding decreases even further for larger issuers, to 0.0009 percent for the smallest company in the S&P 500 and 0.000032 percent for the largest. See Proposing Release, *supra* note 1, at 23.

⁹ We also support the SEC's proposal to eliminate the current 1 percent ownership threshold, as the tiered eligibility proposal tied to dollar value and length of ownership is sufficient to cover the universe of investors who utilize Rule 14a-8 to communicate with boards and management and, as the proposing release notes, the 1 percent threshold is not generally utilized.

¹⁰ Proposing Release, *supra* note 1, at 24.

¹¹ *Id.* at 30.

- **Shareholder Engagement:** In many cases, companies seek to engage with shareholders that submit proposals under Rule 14a-8, only to find that the shareholder is unwilling to meet and/or to negotiate toward a resolution to the issue in question. In these instances, it is often clear that the shareholder is not actually seeking to affect change, but rather to gain attention for their favored cause. In order to facilitate a more useful dialogue, and potentially to allow companies and shareholders to reach an agreement without having to undertake a costly voting process, the proposed rule would add a shareholder engagement component to Rule 14a-8(b). The rule would require a statement from shareholder proponents that they are able to meet with the company about a proposal they have submitted, including their contact information and days that they are available to discuss the issue.¹² The NAM supports the SEC's efforts to encourage shareholder-management dialogue; in furtherance of that goal, we would also support an additional clarification that shareholders must actually make a good faith effort to meet with an issuer after submitting their availability.
- **One-Proposal Limit:** The proposed rule would amend the existing one-proposal limit, currently applicable only to shareholders, to limit shareholders' representatives to one proposal at a given meeting. This would thwart the practice, common among aligned activists, of one activist submitting their own proposal and then those of other activists, or of one representative standing in for multiple activists. The NAM appreciates that the proposed rule would take this step to prevent proponents from gaming the existing one-proposal limit by ensuring it applies equally to shareholders and representatives.

SEC Staff Review of Rule 14a-8 Proposals

The proposing release solicits comment on whether SEC staff should continue to review proposals that companies wish to exclude from their proxy ballot under Rule 14a-8. In general, companies benefit from the certainty that written no-action letters from Commission staff provide. Staff no-action letters stating that companies can exclude a proposal are important in individual instances to validate a company's legal basis for excluding a given proposal, and they also provide clarity and guidance on a going forward basis on how issuers should approach similar proposals.

In September 2019, the Division of Corporation Finance announced¹³ that SEC staff would, beginning with the 2019-2020 proxy season, in some instances provide an oral response to no-action requests instead of a written no-action letter. Manufacturers are still monitoring the implementation of this new approach, but we encourage the staff to continue to be open to issuing a response letter where "doing so would provide value," including instances in which "broadly applicable guidance about complying with Rule 14a-8" would be useful to the issuer or the market.¹⁴

The NAM is sensitive to the timing pressures placed on the staff during proxy season, and we understand that in some instances an oral response to a no-action request will be sufficient, as per the recent Division announcement. However, manufacturers also understand that in many cases investors and issuers would benefit from clear, written guidance from SEC staff. As issuers, shareholders, and the staff continue to evaluate the application of this recent announcement, the NAM respectfully urges the Commission to remain mindful of the degree to which, in many instances, a response letter is the most effective form of no-action relief.

¹² The proposing release solicits comments on whether a shareholder's representative should face a similar requirement when submitting a proposal on the shareholder's behalf. The NAM would support such a requirement.

¹³ *Announcement Regarding Rule 14a-8 No-Action Requests*. SEC Division of Corporation Finance, 6 September 2019. Available at <https://www.sec.gov/corpfin/announcement/announcement-rule-14a-8-no-action-requests>.

¹⁴ *Id.*

II. Resubmission of Shareholder Proposals

Resubmission Thresholds under Rule 14a-8(i)(12)

The NAM has consistently called for reforms to the resubmission thresholds under Rule 14a-8(i)(12). Under the current rule, failed shareholder proposals are guaranteed a spot on the succeeding year's proxy ballot if they garner only 3 percent of the investor vote, with the threshold increasing to 6 percent after two votes and 10 percent after three or more votes. As we said in our October 2018 comment letter, the continued resubmission of these "zombie" proposals with significant shareholder opposition "divert[s] management time and company resources and prioritize[s] a small set of activist investors over the good of the company and the broader shareholder base."¹⁵

As the proposing release notes, the 3, 6, and 10 percent thresholds have been in place since 1954 and, in the NAM's view, are past-due for examination and reform. In 1997, the SEC proposed to increase the thresholds to 6 percent after one vote, 15 percent after two votes, and 30 percent after three or more votes. At the time, the Commission noted that proposals failing to meet the increased thresholds would be "fairly tested" and would stand "no significant chance of obtaining the level of voting support required for approval."¹⁶ The NAM has supported the thresholds proposed in 1997 on the grounds that the increased thresholds would limit the resubmission of zombie proposals that draw attention and resources from the legitimate issues on the proxy ballot.

The proposed rule would implement welcome reforms to the resubmission thresholds for shareholder proposals modeled after the SEC's 1997 rule proposal. Under the proposed rule, proposals would be required to reach 5 percent support to be resubmitted after one vote, 15 percent to be resubmitted after two votes, and 25 percent to be resubmitted after three or more votes. The NAM supports the new thresholds as proposed.¹⁷

By requiring shareholder proposals to sustain a more significant level of support to qualify for resubmission, the proposed rule would ensure that the proposals that make it onto a company's proxy ballot appeal to the broader shareholder base and are relevant to the growth of their investments. If adopted, these reforms would reduce the costs associated with the repeated resubmission of proposals that have overwhelming shareholder opposition. The increased thresholds would also enhance the ability of companies and shareholders to engage on issues that are actually of interest to and impactful for investors.

The proposing release solicits comment on whether the proposed reforms would limit the ability of shareholder resolutions to gain support over time. The threshold for resubmission after one vote remains extremely low under the proposed rule (5 percent support, with 95 percent of shareholders in opposition), so shareholder proposals with any degree of popular support should be able to easily qualify for the next year's ballot. After this second try, proposals would still be able to move forward even with 85 percent of shareholders in opposition, and then with 75 percent in opposition after year three. The proposed tiers are reasonable limits that would still allow proposals to grow support over time despite significant opposition. The NAM strongly supports the proposed resubmission thresholds.

¹⁵ NAM October 2018 Letter, *supra* note 3, at 7.

¹⁶ *Amendments to Rules on Shareholder Proposals*, 62 Fed. Reg. 50682 (26 September 1997). Release No. 34-39093, available at <https://www.sec.gov/rules/proposed/34-39093.htm>.

¹⁷ The proposing release solicits comment on whether the Commission should instead adopt the thresholds it proposed in 1997, which the NAM would also support.

Momentum Requirement

The proposed rule would institute a new momentum requirement in addition to the proposed reforms to the resubmission thresholds. Under the proposed requirement, issuers would be permitted to exclude shareholder proposals that have been considered three or more times if the most recent vote on the matter represented a 10 percent decline in support from the previous vote. This reform would allow companies and shareholders to avoid the time, cost, and distraction associated with the consideration of proposals that may have exceeded the resubmission thresholds but that are declining substantially in shareholder support. The proposed rule specifically exempts from the momentum requirement proposals that have been considered fewer than three times and proposals that have received majority support, so it will not impact proponents' ability to gain support over time, nor exclude proposals that have received overwhelming backing. It would simply build on the proposed reforms to the resubmission thresholds by again focusing issuer and investor attention on important issues that drive long-term company growth and investor returns. The NAM strongly supports the proposed momentum requirement.

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The NAM applauds the SEC for proposing a rule to reform the process by which shareholder proposals are submitted and resubmitted to the proxy ballot. Manufacturers value productive engagement with shareholders, and the proposed reforms to Rule 14a-8 would enhance this vital dialogue. The NAM supports the proposed rule, and we encourage the Commission to expeditiously take steps to finalize it.

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,

A handwritten signature in black ink, appearing to read "Chris Netram". The signature is fluid and cursive, with a long horizontal stroke at the end.

Chris Netram
Vice President, Tax & Domestic Economic Policy