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September 12, 2022

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

Re: File No. S7-20-22; Release Nos. 34-95267, IC-34647: *Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8*

Dear Ms. Countryman:

The National Association of Manufacturers ("NAM") appreciates the opportunity to provide comment to the Securities and Exchange Commission ("SEC") on File No. S7-20-22, the Commission's proposed rule on Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8.[1]

The NAM is the largest manufacturing trade association in the United States, representing manufacturers of all sizes and in all 50 states. Many manufacturers turn to the public market to finance the significant investments in equipment, facilities, research, and workforce necessary for success in the modern manufacturing economy. These publicly traded manufacturers depend on a proxy process that enables smart business growth and strong investor returns. The NAM supports a well-calibrated proxy process that allows company management to engage in a productive dialogue with shareholders about key aspects of the business.

The NAM has greatly appreciated the SEC's work in recent years to protect the integrity of the proxy ballot, preserve the right of investors to engage with management on important corporate governance issues, and limit the impact of activists—who often hold a tiny percentage of the stock of the companies they target. In particular, the NAM strongly supported the Commission's 2020 rule amending the procedural requirements and resubmission thresholds for shareholder proposals under Rule 14a-8.[2]

The 2020 rule instituted targeted adjustments to the submission and resubmission thresholds governing shareholder access to the proxy ballot. Prior to the 2020 amendments, low submission and resubmission thresholds allowed activists with little-to-no stake in a company to push their agendas. The 2020 rule requires shareholders to own more stock for a longer period of time in order to submit a shareholder proposal; it also requires failed proposals to achieve a higher degree of shareholder support before being resubmitted in subsequent years. These changes were designed to center the proxy conversation on the needs of long-term shareholders and ensure that issuers

[1] *Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8*, 87 Fed. Reg. 45052 (27 July 2022). Release Nos. 34-95267, IC-34647; *available at* https://www.govinfo.gov/content/pkg/FR-2022-07-27/pdf/2022-15348.pdf.

[2] *Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8*, 85 Fed. Reg. 214 (4 November 2020). Release No. 34-89964; *available at* https://www.govinfo.gov/content/pkg/FR-2020-11-04/pdf/2020-21580.pdf.

and investors would be able to focus their attention on the vital issues that drive long-term value creation.

The 2020 amendments became effective for shareholder meetings taking place after January 1, 2022. Yet before the 2020 rule took effect, the SEC began taking steps to undermine its critical reforms. In October 2021, the Division of Corporation Finance issued Staff Legal Bulletin ("SLB") 14L, which effectively prohibited companies from excluding from the proxy ballot any shareholder proposal related to environmental, social, and governance ("ESG") topics of "broad societal impact."[3] The 2020 rule was designed to prioritize the needs of long-term shareholders over the agendas of activist investors—but SLB 14L effectively granted activists special access to the proxy ballot to pursue ESG causes of their choosing. At the time, the NAM said that SLB 14L would "incentiviz[e] shareholder proposals wholly unrelated to long-term shareholder value creation" and "transform the Rule 14a-8 no-action process…into an avenue for activists to apply pressure to companies on the political issues of the day."[4]

The SEC has now—just seven months after the 2020 rule took effect—proposed to further empower activists at the expense of public companies and their long-term shareholders. The proposed rule would significantly narrow three of the substantive bases by which companies can exclude shareholder proposals from the proxy ballot. The current exclusion criteria under Rule 14a-8(i) allow companies to exclude proposals that would divert time and resources by forcing shareholders to consider irrelevant, inappropriate, moot, duplicative, or unlawful proposals. The three exclusion criteria that would be amended by the proposed rule—Rule 14a-8(i)(10), (i)(11), and (i)(12)—are designed to limit proposals that have already been substantially implemented by the company, are duplicative of other proposals on a given year's proxy ballot, or have been rejected by a large percentage of the shareholder base in previous years. The proposed rule would make it more difficult for issuers to utilize these exclusions and thus make it easier for activists to flood the proxy ballot with substantially implemented, duplicative, and resubmitted proposals.

The proposed changes largely concern the degree of similarity between a given shareholder proposal and a company's existing policies (substantial implementation), another proposal's text and effect (duplication), or a previously rejected proposal's text and effect (resubmission). At present, companies, investors, and the SEC staff are permitted to conduct fact-based analyses to determine whether the proposal in question is sufficiently similar to trigger the relevant exclusion. The proposed rule, on the other hand, would narrow each criterion to such a degree that only virtually identical proposals could be excluded. The proposed rule's amendments thus would dramatically shift the balance of power away from issuers and long-term shareholders and toward activist proponents. Activists would be empowered to regularly adjust their preferred proposals, continually making changes or adding new conditions to ensure that their idea is always *just* different enough to evade exclusion. This new dynamic will ultimately force companies and shareholders to consider proposals any time an activist demands, irrespective of whether the company has already taken steps to address the underlying issue or whether shareholders have already considered and rejected (or are currently considering) a similar proposal.

The proposing release claims that the proposed rule will provide a "clearer framework" for the evaluation of shareholder proposals' excludability.[5] But it is not obvious that the new standards are any "clearer" than the current criteria under Rule 14a-8(i); rather, the new standards will simply be

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[3] Staff Legal Bulletin No. 14L (3 November 2021). *Available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals.

[4] NAM Comments on SLB 14L (30 November 2021). *Available at* https://documents.nam.org/tax/nam_comments_slb_14l.pdf.

[5] Proposed Rule, *supra* note 1, at 45054.

narrower and thus more difficult for companies to meet. The actual impact of the proposed rule has little to do with clarity or transparency. Instead, the rule will incentivize more shareholder proposals, from a wider range of activists, on a wider range of topics. The rule will also reduce companies' ability to utilize Rule 14a-8 as it was intended, limit their flexibility to implement changes in a way that makes sense for the business, and diminish protections for the shareholders that depend on the public market for long-term financial security.

In addition to the proposed changes to the substantial implementation, duplication, and resubmission exclusions, the proposing release also includes a single sentence about Rule 14a-8(i)(7)—the ordinary business exclusion. According to the release, the SEC intends to "reaffirm the standards the Commission articulated in 1998" with respect to how the ordinary business exclusion should be applied.[6] However, SLB 14L instituted a new interpretation of those 1998 standards less than a year ago. SLB 14L broadens the application of the significant social policy exception to the ordinary business exclusion, effectively prohibiting public companies from excluding any ESG-related shareholder proposals from the proxy ballot. The proposing release's reaffirmation of the Commission's interpretation of Rule 14a-8(i)(7) thus could be read as an attempt to codify SLB 14L. The NAM did not support SLB 14L, and we urge the Commission to withdraw it—not to codify its novel approach via a single sentence in an otherwise unrelated rulemaking.

The SEC's new approach to shareholder proposals is already having a concrete impact on public companies. Fully 60% of the proposals included on companies' proxy ballots during the 2022 proxy season have involved environmental or social issues, an all-time high.[7] And the success rate of companies' no-action requests has plummeted to 38%, down from 71% a year ago.[8] These dramatic changes, which will only be exacerbated if the SEC finalizes the proposed rule, impose significant costs on public companies and their long-term shareholders by effectively forcing them to finance activists' proxy campaigns. In adopting the 2020 amendments, the SEC used a cost estimate of $150,000 in direct issuer costs per shareholder proposal included on the proxy ballot[9]—a substantial capital diversion for manufacturers planning for long-term growth and shareholders investing for the future. The proposed rule will further accelerate the trend of ESG-motivated activist proposals and will impose ever-increasing costs on public companies and their shareholders.

The NAM respectfully encourages the SEC not to adopt the proposed rule. By narrowing the criteria by which companies can exclude shareholder proposals from the annual proxy ballot, the rule would incentivize an increase in both the volume and the prescriptiveness of activist shareholder proposals. It would also force shareholders to repeatedly consider duplicative, moot, and previously rejected submissions. Critically, it would empower activists and prioritize their agendas—at the expense of companies and their long-term shareholders.

I. Rule 14a-8(i)(10)—Substantial Implementation

Rule 14a-8(i)(10) allows a company to exclude any shareholder proposal that "the company has already substantially implemented."[10] This exclusion prevents shareholders from being forced to consider moot questions that have already been addressed by the issuer.

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[6] *Ibid.*

[7] Copland, James R. *Proxy Monitor 2022 Voting Results: Mid-Season Review* (19 May 2022). Manhattan Institute. *Available at* https://www.manhattan-institute.org/proxy-monitor-2022-mid-season-review.

[8] *Shareholder Proposal Developments During the 2022 Proxy Season* (11 July 2022). Gibson, Dunn & Crutcher LLP. *Available at* https://www.gibsondunn.com/shareholder-proposal-developments-during-the-2022-proxy-season/.

[9] 2020 Amendments, *supra* note 2, at 70274.

[10] 17 CFR 240.14a-8(i)(10).

At present, SEC staff review no-action requests under the substantial implementation exclusion by considering "whether the company has addressed a proposal's underlying concerns and whether the essential objectives of a proposal have been met."[11] The proposing release notes, without significant substantiation, that "the current rule may be difficult to apply in a consistent and predictable manner."[12]

The proposed rule would institute a new test allowing for exclusion only when "the company has already implemented the essential elements of the proposal."[13] The proposing release makes clear that companies would be required to show that "all of" the "essential" elements of a proposal have been implemented in order to exclude it.[14]

In making this change, the proposing release provides a roadmap for activists to ensure that their preferred proposals are rarely if ever excluded under the substantial implementation test. Under the proposed rule, activists would be given leeway to continually add new "essential" elements to a proposal in order to distinguish it from a company's current practices. Activists could also offer explanatory language within a proposal identifying its "primary objectives"[15] and describing how, in the activist's view, the company's existing policies or procedures "are insufficient" to meet those objectives.[16] According to the proposing release, activists' characterizations of their own proposals would "guide the analysis" as to whether they could be excluded.[17] Because the proposed test empowers activists to such a degree, companies will be unlikely to seek, and even less likely to receive, no-action relief under the substantial implementation exclusion—effectively rendering Rule 14a-8(i)(10) useless to issuers.

In addition to guaranteeing that activists' proposals will almost always make it onto the proxy ballot, the new standard will also lead to increasing degrees of micromanagement by activists. Only allowing proposals to be considered "substantially implemented" if they completely align with each of an activist's "essential" goals will effectively disregard any steps a company has already taken to address the underlying issue. Instead, companies will be required to implement proposals in accordance with activists' preferred methodologies. This dynamic will incentivize increasingly prescriptive shareholder proposals that seek to control companies' operational decisions—but which nevertheless cannot be excluded under Rule 14a-8(i)(10).

It is not obvious that this new approach will be any easier for the SEC staff to implement than the current standard. Indeed, the proposing release concedes that "[d]etermining whether a proposal could be excluded under the proposed amendment would still require a degree of substantive analysis."[18] In fact, the proposed rule may lead to *more* subjective analysis, given that staff will now be required first to identify "which elements of the proposal are the 'essential elements'" and then to evaluate "whether those elements have been addressed."[19] This new multi-step process will not be any simpler for the SEC or for issuers and investors—but each step will provide new opportunities for activists to insist that their preferred proposals be included on the proxy ballot. After all, inclusion

[11] Proposed Rule, *supra* note 1, at 45055.

[12] *Id.* at 45056.

[13] *Id.* at 45075.

[14] *Id.* at 45056.

[15] *Ibid.*

[16] *Id.* at 45057.

[17] *Id.* at 45056.

[18] *Ibid.*

[19] *Ibid.*

will now only necessitate a determination that a single element of a proposal's many so-called "essential" aspects has not been implemented to an activist's satisfaction.

The only way in which the proposed rule is likely to generate "greater certainty"[20] is that companies will be more certain that their requests for no-action relief under Rule 14a-8(i)(10) will be denied. The proposed substantial implementation framework is no more "objective" or "efficient[ ]" than the current standard[21]—it simply moves the goalposts for companies seeking no-action relief to exclude shareholder proposals that have already been largely implemented. This change will empower activists to make escalating demands and will divert company resources away from long-term growth. As such, the NAM respectfully encourages the SEC not to adopt the proposed amendments to the substantial implementation exclusion.

II. Rule 14a-8(i)(11)—Duplication

Rule 14a-8(i)(11) allows a company to exclude any shareholder proposal that "substantially duplicates" another proposal that will be on that year's proxy ballot.[22] This exclusion prevents the obvious confusion associated with requiring shareholders to consider multiple similar or overlapping proposals at a given year's annual meeting.

Currently, duplicate proposals can be excluded if they have the same "principal thrust" or "principal focus" as another proposal on the ballot.[23] The proposing release alleges that this framework "can be difficult to apply in a consistent and predictable manner."[24] Thus, the proposed rule would redefine "substantially duplicates" to include only proposals that "address[ ] the same subject matter and seek[ ] the same objective by the same means."[25]

It is not obvious that the proposed standard is any more "consistent and predictable" than the staff's current approach. It would simply create more tests that companies must meet in order to exclude a given proposal, and the proposing release does not explain why this more cumbersome approach would yield more "consistent and predictable" results. What is clear, however, is that the new definition of "substantially duplicates" will make it much more difficult for companies to exclude proposals that have a significant degree of overlap with others on the proxy ballot.

By allowing companies to exclude a proposal only if it seeks the exact same objective by the exact same means, the proposed rule would incentivize a deluge of similar proposals, each pursuing an increased degree of micromanagement of company business by activist shareholders. Activists undoubtedly will claim that their preferred "means" of accomplishing a given objective are superior and thus will insist that their proposal be included on the proxy ballot, irrespective of how similar it is to other activists' proposals on the same year's ballot. The proposed rule leaves the SEC staff with little flexibility to grant companies no-action relief to exclude such overlapping proposals. As a result, companies will likely face a spike in proposals addressing the same topic, each with its own specifics about how exactly a company should approach a given problem. Companies will have little ability to protect shareholders from this deluge—or from the increased costs associated with the consideration of an increasingly bloated proxy ballot.

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[20] *See id.* at 45057.

[21] *Ibid.*

[22] 17 CFR 240.14a-8(i)(11).

[23] Proposed Rule, *supra* note 1, at 45057.

[24] *Ibid.*

[25] *Id.* at 45075.

Further, in the event that multiple shareholder proposals are approved that seek similar objectives through different means, companies will face difficult choices regarding whether and how to reconcile these differences. It is entirely plausible that shareholders would vote in favor of multiple similar proposals with the same underlying objective, leaving companies in a difficult position of deciding which proposal(s) to implement and how to address any contradictory "means" by which the shared objective might be accomplished.

In addition to the obvious confusion about how companies can best be responsive to their shareholders, these discrepancies could have significant downstream impacts. For instance, proxy advisory firms often recommend against board nominees when the firms perceive the company to lack responsiveness to shareholder votes—and it is extraordinarily unlikely that ISS or Glass Lewis would grant directors the benefit of the doubt in the event that shareholders approve conflicting resolutions under the new Rule 14a-8(i)(11) standard. And companies now lack the ability to respond to any such negative recommendations given that the SEC has rescinded the erstwhile requirements that proxy firms provide copies of their recommendations to impacted companies and notify investors of any company responses to said recommendations.[26]

Ultimately, the proposed changes to Rule 14a-8(i)(11) would lead to bloated proxy ballots filled with duplicative proposals seeking to micromanage public companies. This new reality will divert company resources, confuse investors, and prioritize the agendas of activists unconcerned with long-term value creation. The NAM respectfully encourages the SEC not to adopt the proposed amendments to the duplication exclusion.

III. Rule 14a-8(i)(12)—Resubmission

Rule 14a-8(i)(12) allows a company to exclude any shareholder proposal that "addresses substantially the same subject matter" as any proposal recently rejected by the shareholder base.[27] In 2020, the SEC adjusted the resubmission thresholds under Rule 14a-8(i)(12), allowing companies to exclude shareholder proposals that failed to achieve 5% of the shareholder vote if voted on once during the previous five years, 15% if voted on twice, or 25% if voted on three or more times.[28]

The proposed rule would replace the current standard allowing exclusion of resubmitted proposals that "address[ ] substantially the same subject matter" with a new limitation that companies can only exclude a resubmitted proposal if it "substantially duplicates" a previously rejected proposal.[29] The proposed rule would define "substantially duplicates" to include only proposals that "address[ ] the same subject matter and seek[ ] the same objective by the same means."[30] This new standard would mirror the proposed duplication test in Rule 14a-8(i)(11).

As with the duplication exclusion, the new resubmission exclusion would allow for an increased degree of micromanagement of company business by activist shareholders and invite year after year of increasingly bespoke proposals with different "means" of accomplishing similar objectives. Under the proposed standard, companies are unlikely to receive no-action relief to exclude similar but not-quite-identical resubmitted proposals—and activists are likely to continue to use company proxy

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[26] *See Proxy Voting Advice*, 87 Fed. Reg. 43168 (19 July 2022). Release Nos. 34-95266, IA-6068; *available at* https://www.govinfo.gov/content/pkg/FR-2022-07-19/pdf/2022-15311.pdf. The NAM strongly opposed the SEC's decision to rescind these critical protections; *see, e.g.,* NAM Comments on File No. S7-17-21 (24 December 2021), *available at* https://www.sec.gov/comments/s7-17-21/s71721-20110752-264616.pdf.

[27] 17 CFR 240.14a-8(i)(12).

[28] *See* 2020 Amendments, *supra* note 2.

[29] Proposed Rule, *supra* note 1, at 45075.

[30] *Ibid.*

ballots to pursue agendas unrelated to shareholder value creation. In the resubmission context, these activists' proposals will have already been rejected by huge majorities of the shareholder base, but the proposed rule would nevertheless grant them free rein to utilize company resources to pursue these "zombie" proposals.

When the SEC proposed the 2020 amendments to Rule 14a-8(i)(12), the NAM said that the increased resubmission thresholds would "ensure that the proposals that make it onto a company's proxy ballot appeal to the broader shareholder base" and that the rule would "reduce the costs associated with the repeated resubmission of proposals that have overwhelming shareholder opposition."[31] The proposed rule would undercut these critical reforms less than a year after they took effect. Under the proposed rule, activists would be empowered to make minor adjustments to the "objective" of a shareholder proposal and their preferred "means" to implement it in order to evade the resubmission thresholds. If the SEC staff agree that these minor adjustments mean that the new proposal no longer "substantially duplicates" a proposal rejected by shareholders in recent years, then companies will have no choice but to include it on the proxy ballot. This could result in proposals rejected by 99% of shareholders being included on the proxy ballot year after year—completely gutting the 2020 amendments and Rule 14a-8(i)(12) as a whole.

The proposed rule would not make direct changes to the 2020 resubmission thresholds, but its impact would be to significantly undercut the 2020 reforms. Unless a new proposal is virtually identical to a previous year's iteration, it will not be treated as a resubmission at all, so there will never be an occasion to consider how many shareholders rejected a similar proposal in years past.

The proposing release alleges that the new standard will allow for more "consistent and predictable determinations" with respect to the excludability of resubmitted proposals.[32] Once again, it is not obvious that the new standard is any "clearer"[33] than the current text of Rule 14a-8(i)(12)—and in fact the proposing release acknowledges that the new test "would continue to require a degree of fact-intensive judgment."[34] Instead, the new language is simply a *different* standard than what currently exists. As such, its adoption would do little if anything to improve "certainty and transparency."[35] Instead, the proposed rule would empower activists and impose significant burdens on companies and their long-term shareholders. The NAM does not support undermining the 2020 amendments to Rule 14a-8 (especially not so soon after they took effect), and we respectfully encourage the SEC not to adopt the proposed amendments to the resubmission exclusion.

IV. Rule 14a-8(i)(7)—Ordinary Business

Rule 14a-8(i)(7) allows a company to exclude any shareholder proposal that "deals with a matter relating to the company's ordinary business operations."[36] This exclusion is designed to preserve the ability of company management and the board of directors to manage day-to-day business issues that are ill-suited for shareholder consideration.

In October 2021, the Division of Corporation Finance issued SLB 14L, significantly broadening the "significant social policy" exception to the ordinary business exclusion. Previously, the social policy

[31] NAM Comments on File No. S7-23-19 (3 February 2020). *Available at* https://www.sec.gov/comments/s7-23-19/s72319-6735509-207647.pdf.

[32] Proposed Rule, *supra* note 1, at 45060.

[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid.*

[36] 17 CFR 240.14a-8(i)(7).

exception required companies to include social policy proposals on the proxy ballot only if a "case-by-case analy[sis]" determined that the policy issue in question was relevant to the company's operations.[37] But SLB 14L announced that the Division is "no longer taking a company-specific approach" to evaluating the excludability of such proposals; instead, the Division will "focus on the social policy significance of the issue" itself.[38] In other words, shareholder proposals will almost never be excludable under Rule 14a-8(i)(7) so long as they raise an issue with "a broad societal impact"[39]—a clear invitation for ESG activists to flood public companies with social policy proposals, irrespective of their relevance to a company's business or long-term financial performance.

The proposing release includes a single sentence about the ordinary business exclusion, stating in the release's introduction that the SEC "reaffirm[s] the standards the Commission articulated in 1998 for determining whether a proposal relates to ordinary business for purposes of Rule 14a-8(i)(7)."[40] It is not clear why this sentence was inserted into the release when the SEC is "not propos[ing] to amend Rule 14a-8(i)(7)."[41] Given this lack of clarity, the NAM is concerned that the Commission may be attempting to "reaffirm" the SEC staff's current interpretation of Rule 14a-8(i)(7) as expressed in SLB 14L and/or to codify SLB 14L itself. Indeed, SLB 14L claims that its approach "is consistent with the Commission's views on the ordinary business exclusion" articulated in the 1998 adopting release[42]—views that the 2022 proposing release claims to reaffirm.

Following the release of SLB 14L, the NAM expressed our concerns that it would "accelerate the trend of politically motivated shareholder proposals and hamstring companies seeking to focus the proxy ballot on issues critical to business growth and investor returns."[43] We continue to hold these concerns, especially in light of the proposed amendments to Rule 14a-8(i)(10), (i)(11), and (i)(12) that would similarly divert attention and resources from long-term value creation. The NAM would not support any attempt to codify SLB 14L—much less via a single sentence in an unrelated rulemaking. If the SEC persists in its efforts to amend Rule 14a-8(i)(10), (i)(11), and (i)(12), the NAM respectfully encourages the Commission to strike any reference to reaffirming Rule 14a-8(i)(7) from any adopting release.

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Manufacturers support a shareholder proposal process that facilitates a robust dialogue between company management and long-term shareholders. Unfortunately, the SEC's proposed rule would undermine these critical issuer-investor conversations by prioritizing the agendas of activists with little stake in the business or interest in its long-term financial success.

By significantly narrowing the criteria by which companies can exclude shareholder proposals from the annual proxy ballot, the proposed rule would incentivize increasing levels of activism and force companies and investors to expend time and resources considering and responding to activist demands. Under the rule, activists' proposals would be prioritized even when companies have already taken steps to address an issue or shareholders have already considered and rejected a similar proposal.

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[37] *Amendments To Rules On Shareholder Proposals*, 63 Fed. Reg. 102 (28 May 1998). Release No. 34-40018; *available at* https://www.govinfo.gov/content/pkg/FR-1998-05-28/pdf/98-14121.pdf.

[38] SLB 14L, *supra* note 3.

[39] *Ibid.*

[40] Proposed Rule, *supra* note 1, at 45054.

[41] *Ibid.*

[42] SLB 14L, *supra* note 3.

[43] NAM Comments on SLB 14L, *supra* note 4, at 2.

The NAM is concerned that the proposed amendments to Rule 14a-8 will increase the volume and prescriptiveness of activist proposals, discourage companies from seeking no-action relief, and undermine the Commission's 2020 reforms to the resubmission thresholds—and we respectfully encourage the SEC not to adopt the proposed rule.

Sincerely,

Chris Netram
Managing Vice President, Tax and Domestic Economic Policy