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Feb. 3, 2020

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-817 CFR Part 240; Release No. 34-87458; RIN 3235-AM49, File No. S7-23-19

Dear Ms. Countryman:

Nareit appreciates the opportunity to comment on the proposed rules (Proposal) issued by the Securities and Exchange Commission (the SEC or Commission) on Nov. 5, 2019, in the proposing release entitled Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (the Proposing Release).[1] Nareit has long urged the SEC to reassess the requirements for submitting and resubmitting shareholder proposals set forth in SEC Rule 14a8(i)(12), most recently in our Nov. 12, 2018 Comment to the SEC in advance of its Roundtable on the U.S. Proxy Process.[2] Nareit also highlighted the shareholder resubmission rule as an important example of an existing SEC rule that is not "functioning as intended" in our comments on the SEC Strategic Plan 2018-2022.[3]

In our previous comments on these matters, Nareit has written that our REIT members believe that the current rules underpinning the shareholder proposal process are not functioning as intended and should be updated and revised by the Commission. Accordingly, Nareit and its members strongly support the Commission's Proposal. We believe that the Proposal accomplishes the Commission's goal, as set forth in the Proposing Release, of "…strik[ing] a balance between maintaining an avenue of communication for shareholders, including long-term shareholders, while also recognizing the costs incurred by companies and their shareholders in addressing a shareholder's proposal."[4]

Nareit is the worldwide representative voice for real estate investment trusts (REITs)[5] and listed real estate companies with an interest in U.S. real estate and capital markets. Nareit advocates for REIT-

[1] SEC, Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 available at https://www.sec.gov/rules/proposed/2019/34-87458.pdf
[2] See, e.g., Nareit Comment in Advance of the SEC's 2018 Proxy Roundtable (Nov. 12, 2018) available at https://www.sec.gov/comments/4-725/4725-4635941-176322.pdf.
[3] Nareit Comment on Draft 2018-2022 Strategic Plan for Securities and Exchange Commission (July 25, 2018) available at https://www.sec.gov/comments/34-83463/cll7-4127822-171766.pdf.
[4] Proposing Release at 25.
[5] REITs are real estate working for you. Through the properties they own, finance and operate, REITs help provide the essential real estate we need to live, work and play. All U.S. REITs own approximately $3 trillion in gross assets, public U.S. REITs

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based real estate investment with policymakers and the global investment community. U.S. REITs were established by Congress in 1960 to give all investors, especially small investors, access to income-producing real estate. Since then, the U.S. REIT approach has flourished and served as the model for more than 35 countries around the world. Investments by retail investors in REITs support properties including offices, apartment buildings, warehouses, retail centers, medical facilities, data centers, cell towers, infrastructure, and hotels.

This comment has been developed with the assistance of a task force of senior U.S. REIT executives involved with the annual proxy process. Below is a summary of our comments on the Proposal and the Proposing Release, which follow:

- Nareit strongly supports the proposed recalibration of the ownership requirements under Rule 14a-8(b), which consider both the amount of securities owned and the duration of a proponent's holdings;

- Nareit supports amending Rule 14a-8(b) to add a shareholder engagement component to the current eligibility requirements;

- We support the modified eligibility requirements under Rule 14a-8(b) to require that a shareholder using a representative to submit a proposal must provide the SEC with documentation identifying the shareholder, information documenting the shareholder's authorization and other relevant information;

- Nareit supports limiting abuse of the "one proposal" rule and therefore support the proposed amendments to Rule 14a-8(c) to apply the one proposal rule to "each person"; and,

- Nareit strongly supports the Commission's proposed increase in the resubmission thresholds under Rule 14a-8(i)(12).

I. The Proposed Amendments to the Rule 14a-8 Eligibility Requirements

Nareit members believe that the current Rule 14-1-8 thresholds are outdated and no longer serve their purpose of establishing that shareholder proposal proponents have a genuine stake in the long-term success of a recipient company before commanding the powerful mechanism of the shareholder proxy. Accordingly, Nareit strongly supports the Proposed Amendments to Rule 14a-8, under which a

account for $2 trillion in gross assets, and stock-exchange listed REITs have an equity market capitalization of over $1 trillion. In addition, more than 80 million Americans invest in REIT stocks through their 401(k) retirement and other investment funds. Additional information available at www.reit.com.

shareholder would be eligible to submit a proposal for inclusion in a company's proxy statement if the shareholder has continuously held at least:

- $2,000 of the company's securities entitled to vote on the proposal for at least three years;
- $15,000 of the company's securities entitled to vote on the proposal for at least two years; or,
- $25,000 of the company's securities entitled to vote on the proposal for at least one year.

Additionally, many of our REIT members have concluded that the current rules governing the introduction of shareholder proposals have given rise to a variety of misuses of the shareholder proposal process. Nareit members have experienced many troubling proposals that other issuers have reported, including proposals submitted by people who often submit proposals to dozens of firms each proxy season. Some of our members have received proposals submitted by self-identified "disrupters" that are only interested in short-term financial or trading gains. Many other REITs have experienced another type of abuse of the shareholder proposal process that is troubling, which are oppositional proposals submitted by an organization exempt under section 501(c)(5) of the Internal Revenue Code to certain REITs to gain leverage over management in an unrelated negotiation, or to achieve a self-serving goal unrelated to the subject of the proposal.

During the last four proxy seasons, REITs reported many instances in which this shareholder holding the minimum shares under Rule 14-a-8, or close to the minimum, submitted shareholder proposals that were clearly intended to advance self-interested objectives, distinct from goals that would benefit stakeholders broadly.

For example, one of our members, a lodging REIT, recently received a shareholder proposal from this same section 501(c)(5) organization predicated on *de minimis* holdings related to reporting procedures for sexual harassment incidents at its hotels. Under U.S. tax rules, REITs cannot operate or directly manage hotels[6], and instead must engage an "eligible independent contractor (EIC). The EIC, as the operator, retains the sole right and responsibility for hiring, training and supervising hotel employees and for safety of its work force and hotel guests.[7] Because this REIT supports the goal of preventing sexual harassment, and has publicly and privately supported its EICs' efforts to address it, its management

[6] All REITs must derive most of their gross income from rents from real property, interest on mortgages financing real property or sales of real estate. I.R.C. § Section 856(d)(8)(B) prohibits lodging REITs from, directly or indirectly, operating or managing a lodging facility. Failure to follow these tax rules would mean that a company would lose its status as a REIT, to the detriment of all REIT stakeholders, including its employees.

[7] Pursuant to I.R.C. § Code section 856(d)(9), a lodging REIT must use an "eligible independent contractor" (EIC) to operate the hotel. The EIC has sole responsibility and exclusive authority for all activities necessary for the day-to-day operation of the hotel(s).

decided to engage with the section 501(c)(5) organization proponent, notwithstanding the REIT's inability to effectively address the stated concerns in the proposal. In the course of the discussion, the organization offered to drop the proposal if the REIT would take steps to have its EIC agree to unionize one of its several properties—a demand wholly unrelated to the ostensible goal of the proposal, to address sexual harassment. At least nine other U.S. lodging REITs received similar proposals during the 2019 proxy season from the same organization proponent, each predicated on *de minimis* holdings.

Other U.S. lodging REITs have reported strikingly similar scenarios during recent proxy seasons, when this shareholder has submitted proposals predicated on minimum 14a-8 shareholdings and simultaneously, or subsequently, made demands related to contract negotiations, or other self-interested business objectives that were unrelated to the ostensible purpose of the organization's proposal. This proponent has submitted at least 52 stockholder proposals to 20 U.S lodging REITs and hotel operators in the last decade. This tactic is now so well established that recipients of these proposals generally recognize that they are related to contract negotiations with another party (their EICs) distinct from the stated subject of the proposal. Our members who have received these proposals also report that when they engage with the proponent, they are rarely told otherwise. It is very difficult to view these facts as anything other than a subversion of the shareholder proxy process.

Notwithstanding these concerns, Nareit believes that it is important to preserve the ability of stakeholders to present legitimate proposals when they have a meaningful long-term interest in the outcome. But we equally believe that the modest amendments to the Rule 14a-8 eligibility requirements set forth in the Proposal would represent a constructive step towards curbing abuse of the shareholder proposal process and refocusing the process on meaningful dialogue between companies and shareholders with a real stake in the outcome of companies.

II. Proposed Amendments to Rule 14-a-8(b) to Promote Shareholder Engagement

Nareit supports the proposed amendments to Rule 14a-8(b) to promote engagement with shareholder proponents, by requiring that a proposal proponent provide a statement setting forth contact information and confirming his/her availability to meet with the company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after the submission of a shareholder proposal.

Nareit has always supported frequent and constructive communication between public REITs and investors, which we believe is essential to strong performance and operations that serve investors and stakeholders alike. Virtually all of our public REIT members have regular dialogue with shareholders covering a range of issues. Moreover, many of our REITs report that their boards also separately engage with investors regularly. We have also been told that many REITs currently have a policy of reaching out

to shareholder proposal proponents upon receipt of a new proposal. Accordingly, we believe that this new requirement would add another constructive avenue to shareholder engagement.

III. Proposals Submitted on Behalf of Shareholders

Nareit supports the proposed amendments to Rule 14a-8 that would require shareholders using a representative to provide documentation identifying the shareholder and evidence of the shareholder's authorization for the representative's action. We agree that this would provide necessary transparency, though we question whether these changes alone would be sufficient.

Nareit has previously urged the SEC to issue guidance, or take other regulatory measures, to ensure that investors have sufficient information regarding the proponents of shareholder proposals to evaluate them.[8] In our 2018 Comment, we noted that frequently shareholders do not know key facts that are essential to evaluate the merits of a shareholder proposal including: the quantity of the number of shares held by the proponent; whether the proponent holds short positions; whether the proponent has relevant conflicts of interest; whether the proponent has submitted similar proposals to other firms; and, whether the proponent has a history of proxy activism.[9] Accordingly, Nareit respectfully suggests that the SEC consider expanding this requirement to include such additional information.

IV. The Proposal to Apply the One Proposal Limit to One Person

Nareit supports the proposed amendments to Rule 14a-8(c) that would apply the one-proposal limit to "each person" rather than "each shareholder," in an effort to prevent shareholders from submitting more than one proposal to a company for a shareholder meeting. Nareit agrees with the conclusion set forth in the Proposing Release that "… a shareholder submitting one proposal personally and additional proposals as a representative for consideration at the same meeting, or submitting multiple proposals as a representative at the same meeting, would constitute an unreasonable exercise of the right to submit proposals at the expense of other shareholders and also may tend to obscure other material matters in the proxy statement."[10]

The Proposing Release requests comment on whether, as an alternative, the SEC should require the shareholder-proponent to disclose to the company how many proposals it has submitted directly, through a representative, or as a representative to the company. We endorse the addition of this requirement, and do not believe it need to be considered only as an alternative. Per the discussion above, we believe that such information is important and is often material to a shareholder's decision of whether to support a proposal presented in the proxy statement.

[8] Supra Note 2.
[9] Id at pp. 8-9.
[10] Proposing Release at p. 38.

V. The Proposed Amendments to Rule 14a-8(i)(12) to Raise the Resubmission Thresholds

Nareit has long supported[11] requests that the SEC explore raising the thresholds to resubmit a proposal. We supported the 2014 Petition for Rulemaking Regarding Resubmission of Shareholder Proposals.[12] We agree with the analysis in this petition, as well with as more recent research regarding the costs to companies and their shareholders of re-presenting failed proposals. For this reason, Nareit and its members strongly support the proposed amendments to the voting thresholds required for resubmitting a failed proposal in a subsequent year.

The proposed amendments to Rule 14a-8(i)(12) would replace the current resubmission thresholds of 3, 6, and 10% with new thresholds of 5, 15, and 25%, respectively, and also permit companies to exclude proposals that have been submitted three or more times in the preceding five years if less than 50% of the vote and support declined by more than 10% since the prior vote. We believe that this is an appropriate and indeed modest step towards redressing the balance in the shareholder proposal process.

The experience of Nareit's members with resubmitted shareholder proposals is roughly similar to that of other U.S. public companies, as reported in published surveys.[13] Nareit members believe that roughly 20-30% of the proposals that they receive are resubmitted, or are substantially similar, to previously submitted proposals. They report that these "repeat" proposals are time consuming for their boards and management. They also worry that these proposals are confusing for shareholders.

Nareit's members do not agree with the perspective that has been expressed by some that raising the resubmission thresholds would hurt shareholders by impairing the ability of beneficial proposals gain traction over long time periods. We have not seen persuasive support for this claim. To the contrary, we agree with the Commission's conclusion that the raising these thresholds may lead to more meaningful shareholder participation in the proxy process by prompting shareholders to focus on proposals that will garner greater support and lead to actual constructive change.

[11] Supra Note 2 at pp. 6-7; and Letter from Corporate Governance Coalition for Investor Value, July 17, 2017, *available at* https://www.centerforcapitalmarkets.com/wp-content/uploads/2017/07/20170717-CGCIV-Final-Resubmission-Thresholds-letter.pdf.
[12] Petition 4-675, Petition for Rulemaking Regarding Resubmission of Shareholder Proposals Failing to Elicit Meaningful Support (April 9, 2014), available at https://www.sec.gov/rules/petitions/2014/petn4-675.pdf
[13] See, e.g., J. Copland & M. O'Keefe, A Report on Corporate Governance and Shareholder Activism, Fall 2016, available at https://www.proxymonitor.org/Forms/pmr_13.aspx.

Conclusion

Nareit commends the SEC for undertaking its comprehensive review of the U.S. proxy process, which culminated in these proposed amendments to Rule 14-a-8 regarding the eligibility of shareholders to submit shareholder proposals and the voting thresholds required for their resubmission in subsequent years. Nareit believes that recalibrating these rules is important to the long-term health of the REIT sector and the U.S. public company sector generally.

Nareit members strongly believe that bringing greater accountability and transparency to the rules and procedures governing the annual proxy process and addressing troubling conflicts of interest is essential to maintaining investor trust and confidence in U.S. public companies. For this reason, Nareit has also commented on the SEC's Proposed Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice.[14]

Nareit and its members would be happy to support the work of the Commission and its staff as the Commission moves forward with efforts to modernize the proxy rules. We also would be happy to answer any questions that you may have about Nareit's comment. Please feel free to contact us (tedwards@nareit.com, (202) 739-9408; and vrostow@nareit.com, (202) 739-9431), with any further questions that you may have.

Respectfully submitted,

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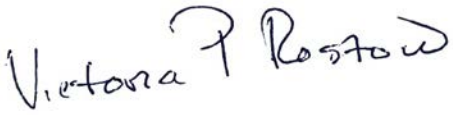

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[14] Nareit Comment to the SEC on Proposed Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, Release No. 34-87457 (Nov. 5, 2019) available at https://www.sec.gov/comments/s7-22-19/s72219.htm.