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December 3, 2015

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington DC 20549-1090

Re: File No. S7-18-15 - Amendments to the Commission's Rules of Practice

Dear Mr. Fields,

We are submitting this letter in response to the solicitation by the Securities and Exchange Commission (the "Commission") for comments on the amendments to update the Commission's Rules of Practice. We support the Commission's efforts to introduce additional flexibility into administrative proceedings, while still providing for the timely and efficient disposition of proceedings. To the extent the Commission does amend the Rules of Practice (the "Rules"), we believe that the amended Rules should be applied in whole to cases pending as of the effective date where possible.

Nonetheless, the proposed amendments do not go far enough in providing respondents in administrative proceedings with sufficient protections to ensure the fairness of the proceeding, particularly when compared against the protections provided to defendants in actions commenced in federal district courts. Furthermore, the Rules, even as amended, do not sufficiently resolve the inequities between the Division of Enforcement (the "Division") and respondents in administrative proceedings. Finally, the amendments do not address many of the other Rules that do not provide respondents with adequate procedural protections and will remain unfair even in light of the proposed changes. Without a substantial overhaul of the Rules, the Commission will likely continue to face constitutional challenges from respondents in administrative hearings who believe they have been denied their right to due process. *See, e.g.*, *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015).

A. The Expanded Administrative Proceeding Schedule Does Not Give Respondents Sufficient Time to Prepare in Complex Cases

In practice, the current iteration of Rule 360 provides respondents with only four months to review the Division's investigative file and prepare for the administrative hearing, regardless of the number or complexity of issues presented in the matter. The Commission's proposed changes to Rule 360 would give ALJs the discretion to schedule the administrative hearing up to eight months after the service of the OIP. Thus, even under the proposed amendments, the ALJ can choose not to expand the timeline to eight months and order that the hearing proceed on a four month schedule instead. The Commission did not provide any guidance or criteria for how that critical decision would be made, beyond stating that the enhanced flexibility is intended to afford the parties sufficient time to conduct discovery.

The proposed changes to Rule 360 do not adequately level the playing field between the Division and the respondent, and thus Rule 360 continues to fail to adequately protect respondents' due process rights in administrative proceedings. The Division can (and sometimes does) investigate and prepare its case for *years* prior to serving the OIP. The Division can (and sometimes does) request innumerable documents, interview dozens of witnesses, and take testimony from even more witnesses, all of which allow the Division to prepare, analyze, and test its case before bringing an action against the respondent. The respondent, on the other hand, is given only months to review and analyze the Division's investigative file, which may contain millions of pages of documents and notes from many interviews. Only after reviewing the investigative file can the respondent truly begin to prepare its defense, which may require even further fact and expert discovery and analysis. Respondents must also, in this time, prepare for, conduct, and attend depositions, and review documents subpoenaed in connection with those depositions, pursuant to the proposed amendments to Rule 233. The disparity between the Division and respondents stands in even starker contrast to the due process protections that would be provided to the respondent in federal district court, where plaintiffs and defendants are granted equal periods of time to investigate and prepare their case during discovery.

Beyond the evident inequities in the preparation time granted to the Division and respondents, the proposed amendments also do not sufficiently account for the varying degrees of complexity presented in cases brought by the Division. Administrative proceedings can be relatively straightforward, or can involve complex transactions, industries, or technologies. Although the Division can compensate for a matter's complexity by taking additional time to bring its case, respondents are granted no similar accommodation, and must be prepared, in a few short months, to defend a case that may involve many varied issues, engaging several expert witnesses, new or complex technologies, and the interplay of many different parties, entities, and agencies. By way of comparison, the discovery period in federal district court actions is typically dictated by the complexity of the case and the amount of discovery necessary to ensure that the parties are able to develop all relevant information prior to trial. And even so, the court would have the flexibility to change that schedule as justice requires. Gauging the amount of time between the commencement of the case and the hearing based on the specifics of the case would provide respondents with a more fair hearing and help ensure they are not deprived of their constitutional due process rights. As such, the Rules should be amended to: (a) further expand the maximum period of time between the OIP and the hearing; and, (b) allow the parties to petition the ALJ for additional time in particularly complex cases.

B. The Availability of Limited Depositions Does Not Provide Respondents with Sufficient Discovery

Pursuant to the current form of Rule 233, the parties are permitted to take the deposition of a witness only if the witness will be unable to attend the hearing. Under the proposed amendments to Rule 233, respondents and the Division will be permitted to file notices to take depositions and request that the ALJ issue document subpoenas in conjunction with the depositions. In a proceeding involving one respondent, each side will be permitted to depose three individuals, and in proceedings involving multiple respondents, each side will be permitted to depose a total of five individuals. This deposition limit encompasses both fact and expert discovery.

The proposed changes to Rule 233 do provide respondents with increased discovery in administrative proceedings. However, permitting only three depositions does not come close to guaranteeing that respondents will be able to fully and fairly prepare and present their defense during the hearing. First of all, again here, the proposed changes clearly do not resolve the inequity between the Division, which receives the same number of depositions in the administrative proceeding ***and*** is also able to interview and take testimony from innumerable witnesses during its investigation and respondents, who will be limited to only three opportunities to develop witness testimony prior to the hearing. This inequity is particularly obvious in complex cases, where the respondent may need to depose far more than three witnesses to fully develop its defense.

Moreover, the inadequacy of three depositions is even more obvious when one considers that the Division controls the number of expert witnesses it may choose to call. If the Division discloses two experts – which is not a farfetched assumption – the respondent effectively is limited to a single fact deposition. The three deposition limit also is revealed to be inadequate in comparison to the discovery available in federal district court, where parties are granted at least ten depositions and typically take many more in complex cases. Without the ability to take adequate depositions and develop the factual record necessary to support its defense, a respondent in an administrative proceeding still may be deprived of its due process rights, even under the amended Rule 233.

Additionally, although the Division may take the view that respondents need less discovery because they are in possession of the most relevant information, this is not necessarily the reality in many complex cases. For example, respondents may need information from outside experts, analysts, and former employees in order to prepare for and present their defense. Limiting respondents to three depositions assumes, without support, that respondents will be able to marshal sufficient evidence to defend themselves from internal sources. Although that may be the case in some instances, there are many situations in which crucial evidence is not available to the respondent from any source other than the deposition of a third party. This is particularly the case where the Division is bringing an action based on the respondent's interactions with other government agencies. It would be difficult for respondents in this situation to gather evidence directly from the agency itself, and thus depositions of agency employees are the only means for gathering and assessing critical evidence prior to the hearing. Limiting respondents to three depositions in this situation would be patently unfair, and may constitute a due process violation that the respondent would pursue in federal court.

Although it appears the Commission is providing only limited depositions in an effort to streamline administrative proceedings, allowing for expanded depositions would *create* greater efficiencies. Without the ability to depose witnesses, respondents are forced to call all individuals with potentially relevant testimony as witnesses at the hearing. It may well be the case that the witness in fact has no relevant information, and the Division's, respondent's, and ALJ's time has been wasted. Allowing respondents to take additional depositions before the hearing would allow the parties to narrow the evidence ultimately presented to the ALJ, which would provide for even greater efficiencies at the hearing. Indeed, the Commission recognized the efficiency gained by depositions when it stated:

> The proposed amendment is intended to provide parties with an opportunity to develop arguments and defenses through deposition discovery, which may narrow the facts and issues to be explored during the hearing. Allowing depositions should facilitate the development of the case during the prehearing stage, which may ultimately result in more focused prehearing preparations, with issues distilled for the hearing and post-hearing briefing.

Amendments to the Commission's Rules of Practice, 80 Fed. Reg. 60091 (Sept. 24, 2015). We agree. However, the idea that three depositions will provide a genuine opportunity to limit issues is not realistic given the complexity and breadth of the issues that the Commission frequently investigates.

Permitting parties to take ten depositions, as Federal Rule of Civil Procedure 30 allows, would provide the parties the opportunity to more fully develop their case and narrow the facts and issues to be presented at the hearing. Moreover, drawing the Rules in line with Federal Rule of Civil Procedure 26(b), which allows parties to request leave of court to take more than ten depositions, would further improve the fairness of Rule 233. Allowing parties to petition the ALJ for additional depositions would both help to resolve the inequities between the Division and respondents and allow particularly complex cases to proceed efficiently while respecting respondents' due process rights.

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Very truly yours,

Navistar International Corporation