

Via Hand Delivery

August 12, 2019

Mr. William Hinman
Director, Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: *SEC Corporation Finance 14a-8 Process*

Dear Director Hinman:

At the annual Rule 14a-8 stakeholder meeting on June 21, and in our meeting with you and Corporation Finance staff members on July 12, you asked about a potential change that would have Securities and Exchange Commission (SEC) staff pull back to some extent from the no-action process. As we understand it, the staff would issue no written decisions for some company “no-action” requests related to shareholder proposals, and in some cases, the staff might not provide any view. On other matters, the staff might do so verbally rather than in written form. On still other matters, the staff might, consistent with the existing process, provide a written no-action response.

We believe the staff has played a valuable role for many years through the 14a-8 no-action process. Management attempts to omit shareholder proposals by definition involve contention between parties. Despite this, in most cases the staff no-action advice has been accepted by both sides, and there has been only limited litigation. Moreover, the staff responses have helped various stakeholders navigate this terrain with much greater efficiency than would be the case without written responses by the staff.

In light of this history, we initially were doubtful about this idea of ending written responses on some matters. As we have thought about it more, considering input from both investors and company managers, we have become more convinced that this is NOT a good idea. We agree with Elizabeth Ising of Gibson Dunn that many companies and shareowners “take comfort in the staff weighing in” and that the approach you have described would “create chaos on all sides.”

We believe the following:

- Any comparisons with no-action processes outside the 14a-8 context are not apposite. Where there are opposing parties, a written conclusion is particularly critical, notwithstanding the informal nature of the existing process. Presently, there is a clear mechanism with a clear result that both sides understand that helps guide all participants going forward. We think the transparency and accountability is highly useful, including

where stakeholders challenge the SEC, and thinking becomes more refined. In fact, we would suggest that if there is change here, it might be for staff to provide a bit more clarification of its views on particular proposals, rather than the removal of transparency on staff views.

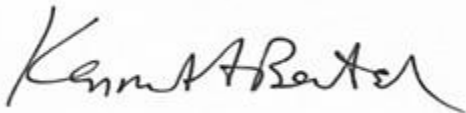
- In the absence of publicly available written staff responses, market participants are more likely to spin their wheels, expending effort due to a lack of clarity on what proposals are appropriate. We would anticipate an increase in litigation.
- You mentioned that the staff might not opine where the staff believes it lacks expertise. As suggested in a July 11, 2019, letter to the SEC from Sanford Lewis on behalf of the Shareholder Rights Group:

The notion that the Staff might decline to rule on some proposals or issues where the Staff lacks expertise poses the question of whether the staff would later recommend enforcement action if the proposal is excluded by the company. If the staff was unable to form an opinion at the time of submission of a request, does that mean in effect that the Staff would not recommend enforcement action if the company excludes the proposal? Or would it mean that the staff is deferring the research or analytical process needed to decide on enforcement referral? Wouldn't this undermine incentives for engagement?

- Depending on the nature and extent of the SEC pull-back, we could see real damage to the shareholder proposal process in the longer-term. In the absence of staff responses at all on some matters, we would expect some risk-averse companies to include proposals that would have been excluded under the current regime. Some of these proposals are likely to be misguided or on trivial issues, particularly as some shareholders perceive that the company has a low bar for consideration of proposals. On the other hand, companies that are inclined to freeze out shareholders – which tend to be the ones shareholders are more concerned about – are likely to exclude meritorious proposals, notwithstanding the risk of litigation. In combination, this dynamic could serve over time to substantially degrade the shareholder proposal process.

We oppose the potential changes you discussed based on the concerns above. We would be happy to discuss this further.

Sincerely,



Kenneth A. Bertsch
Executive Director

A handwritten signature in cursive script that reads "Jeff Mahoney".

Jeffrey P. Mahoney
General Counsel

CC: The Honorable Jay Clayton, Chairman, U.S. Securities and Exchange Commission
The Honorable Robert J. Jackson Jr., Commissioner, U.S. Securities and Exchange Commission
The Honorable Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission
The Honorable Elad L. Roisman, Commissioner, U.S. Securities and Exchange Commission
The Honorable Allison Herren Lee, Commissioner, U.S. Securities and Exchange Commission