<u>Via Hand Delivery</u>

September 19, 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: Investor Concerns and Recommendations Regarding the
Division's No-Action Process Announcement of September 6, 2019

Dear Director Hinman,

We are writing on behalf of our members to express major concerns regarding the September 6, 2019 "Announcement" of the Division of Corporation Finance[1] regarding Rule 14a-8 no-action requests. Under this newly announced policy, the range of anticipated options for Rule 14a-8 no-action responses will be expanded to include instances where the Staff "declines to state a view" or responds "orally." We request the Division rescind this change in process, as it reduces transparency and accountability, increases the burden on investors, and could increase conflict between companies and their investors.

As you know, the Staff has for decades made a consistent practice of responding to no-action requests regarding shareholder proposals by either concurring with the company's legal arguments for exclusion of a proposal, or notifying the company that the Staff is unable to concur. Only in very rare exceptions did the Staff decline to issue a decision, typically limited to circumstances in which a pending litigation, or a pending SEC rulemaking or Staff deliberation, was focused on interpretation of the Rule 14a-8 exclusion addressed in the no-action request.[2]

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[1] https://www.sec.gov/corpfin/announcement/announcement-rule-14a-8-no-action-requests

[2] Three exceptional categories where the Staff previously declined to make a determination were when the proponent had filed a lawsuit seeking declaratory relief from the courts that a proposal was not excludable, *Gulf Oil Corporation* (February 3, 1982), *Cracker Barrel Old Country Stores, Inc.* (September 21, 1993), during a Rule 14a-8 rulemaking in 1983 in which the

This process of notifying the parties as to whether or not the Staff would refer a company's exclusion of the proposal for enforcement has generally served the parties well by providing an element of predictability, while the new exceptions to this consistent practice appear to be unbounded by any timeframes or standards of decision.

The new announcement raises substantial questions and concerns for issuers and proponents alike. The dramatic change to SEC practice posed by the announcement merited prior circulation of a written draft to affected stakeholders so that they could have commented effectively. As Gibson Dunn has written, the announcement portends a "tumultuous" proxy season ahead.[3]

Most retail shareholders who choose to file a proposal have long relied on the SEC to protect investors by enforcing the agency's rules. Although the absence of a no-action decision does not technically preclude later enforcement action by the SEC, one might infer that when Staff "declines to state a view" the Staff might also decline to recommend enforcement if the proposal is excluded. This would place the burden of enforcement of the Commission's rules on the proponents, who may have to resort to litigation to enforce the rule. Thus, the outcomes resulting from the SEC's announcement place an unreasonable and unfair burden on investors -- especially smaller and individual investors, whose protection is a central priority for SEC Chairman Jay Clayton. We assume that it is not the Division's intention to escalate the amount of issuer-investor tension, costs, and conflicts associated with shareholder proposals, yet the new process appears likely to do so.

Further, oral decisions will result in reduced transparency and decreased accountability. They will take the no-action process out of the domain of readily trackable written transactions, and toward the possibility of deliberations or decisions in which proponents may lack symmetrical access to communications and evidence presented to the Staff. Moreover, the lack of a written record also undermines the ability of the market to gain predictive understanding of Staff thinking, while the lack of transparency prevents legislative oversight.

We recommend that the Division rescind the policy and retain the process that has worked reasonably well for decades. The number of no-action requests processed by the Staff has not increased, and thus this change does not seem merited. In the event that the SEC does not rescind the new policy, we offer the following suggestions to reduce the level of uncertainty and conflict resulting from the new approaches:

Commission's interpretation of a number of 14a-8 provisions were in flux, *NL Industries Inc.* (January 27, 1983), and during internal deliberations regarding the applicability of Rule 14a-8(i)(9) in 2015, *Apache Corporation* (February 5, 2015).

[3] https://www.gibsondunn.com/sec-staff-announces-significant-changes-to-shareholder-proposal-no-action-letter-process/

1. <u>Keep the new options as exceptional</u>. Clarify that in the coming season, the new options will not be routinely or widely utilized, but instead will be deployed on a few pilot decisions until the implications are better understood. This would stay in line with the SEC historically declining to issue a decision only in exceptional conditions such as ongoing litigation[1] on the core legal issue raised by the proposal.

2. <u>Establish clear criteria for deployment of the new options</u>. Describe the criteria for determining when the agency will *decline* to issue a no-action decision or issue an "oral" determination. An overarching set of guidelines seems necessary to guide staff decision-making and inform the market; to the extent that general criteria are not possible, we urge that the Staff include an explanation of the use of the options on a case-by-case basis consistent with prior practice. For example, in declining to issue a decision, the Staff might note that the issues are addressed by Staff precedents (include citation to exemplary precedents). Similarly, the Staff might note that it is declining to decide the issues in a no-action letter, but that this does not preclude later referring the matter for enforcement.

3. <u>Establish early time frames</u>. We recommend that the Staff signal a clear and routine time limit on when the "no-determination" option will be taken. To the extent that the Staff could make determinations to decline to issue an opinion early, e.g. within seven days of receiving a no-action request, it could help avert futile efforts and expenditures by investors to prepare a proponent's response for the Staff's consideration, and allow time to pursue litigation. Conversely, we seek clarification as to whether the Staff will await a response from the proponent before choosing one of these forms of disposition.

4. <u>Clarify online posting</u>. The Staff has noted to a reporter for Standard & Poor's that it will signify online, in some manner, these new dispositions, together with any letters.[4] We request that any correspondence from the proponent's perspective, as well as the issuer's request, be posted online with the statement of disposition.

5. **<u>Specify procedural safeguards for oral decisions.</u>** Procedures for rendering oral decisions should ensure fair and symmetrical information and access by the parties. For instance, the Staff could conduct a conference call in which the issuer and proponent are each represented to hear the same presentation. As one observer has suggested, the Staff could allow the audio recording of such a call.[5]

We would like to suggest that before the no-action season is in full swing, representatives of our organizations meet with the Staff to try to address the issues noted above.

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[4] https://www.spglobal.com/marketintelligence/en/news-insights/trending/JCVjMTNaPIprvNiU5Qwq2w2

[5] https://www.thecorporatecounsel.net/blog/2019/09/corp-fins-big-shareholder-proposal-announcement-oral-responses.html

Sincerely,

Kenneth A. Bertsch
Executive Director
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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