Via electronic delivery

June 11, 2018

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

RE: No-Action Season - Investor Concerns and Request for Meeting

Dear Messrs. Clayton and Hinman,

We write at the close of the Rule 14a-8 no-action letter season to provide feedback from investor-stakeholders. As you know, last year's Staff Legal Bulletin 14I introduced new practices, including inviting boards of directors to submit "findings" in support of ordinary business or economic irrelevance claims. In addition, recent Staff decisions have introduced substantial changes regarding the implementation of Rule 14a-8(i)(7) (micromanagement) and Rule 14a-8(i)(9) (conflict with management's proposal).

Although as investors we have different perspectives and priorities, we generally share the four concerns stated below. We believe that it would be useful for representatives of the proponent community to meet with you to discuss these prior to the annual multiparty "stakeholder" meeting to aid in shaping that conversation and its follow-up.

1. Staff's new analytical approach increases uncertainty and inefficiency.

This season the Staff invited companies to test new arguments and approaches to challenge proposals even on subject matters that had long been considered significant policy matters. We believe that, in practice, the new approach has often been inefficient, unpredictable and time-consuming for both companies and proponents.

Although the Staff's process has always been case-by-case, both proponents and issuers have come to rely upon a reasonably consistent decision-making framework for drafting and challenging proposals. Predictability in Staff decision-making reduces costs for both sides. In contrast, the new approach often creates uncertainties that encourage "kitchen sink" arguments. This season, proponents, companies, and Staff had to devote time to many no-action requests on proposals with a long history of shareholder support at multiple companies.

Although Staff's implementation of SLB 14I resulted in a flurry of novel arguments and challenges, with the exception of the changing interpretations of micromanagement and Rule

14a-8(i)(9) discussed below, the results have largely been the same as prior years. That being said, many proponents are concerned by language in some no-action decisions that seem to signal new directions for future decisions.

2. New interpretation of micromanagement undermines investor engagement.

It appears that the Staff has altered its approach to determinations of micromanagement under 14a-8(i)(7). As stated in the 1998 Release, the ordinary business exclusion is intended to "confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for the shareholders to decide how to solve such problems at an annual shareholders meeting."[1] In applying this principle to micromanagement, the Release stated that micromanagement involved "probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment."

Consistent with this rationale, micromanagement exclusions have historically been limited to proposals that sought to manage the minutiae of the company's business and not to proposals addressing material questions of business strategy associated with a significant policy issue.[2] No-action requests regarding the adequacy of existing corporate responses to significant policy issues were submitted under Rule 14a-8(i)(10), where they were carefully measured for substantial implementation against a proposal's terms.

This season, the Staff found in a number of instances where a company had existing policies on a complex issue, that even proposals seeking top-level action on those issues constituted micromanagement. If we are interpreting the decisions correctly, this represents a radical departure from the past, potentially foreclosing proposals on a very wide range of material and significant policy matters where the scale, pace, or rigor of management responses is at issue.

A key example raising this concern is the decision in *EOG Resources, Inc.* (February 26, 2018), where the proposal asked the company to set targets for the reduction of greenhouse gas (GHG) emissions. The proposal was allowed to be omitted as micromanagement, even though it sought the adoption of a high-level business strategy commonly deployed by many other large companies on a widely recognized, significant policy issue facing the company and society.[3] The proposal did not seek to dictate minutiae. It left management with full discretion to determine the timing, scope, and magnitude of appropriate targets.

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[1] Release No. 3440018.

[2] Traditional micromanagement exclusions are exemplified by proposals attempting to prescribe the minutiae of operations. *Marriott International Inc.* (March 17, 2010) prescribing the flow limits on showerheads; *Duke Energy Corporation* (February 16, 2001), attempting to set regulatory limits on the company -- 80% reduction in nitrogen oxide emissions from the company's coal-fired plant and limit of 0.15 lbs. of nitrogen oxide per million British Thermal Units of heat input for each boiler.

[3] This strategy is already adopted by over half of all S&P 500 companies that have set GHG emissions reduction targets. https://www.worldwildlife.org/press-releases/report-fortune-500-companies-accelerating-renewable-energy-energy-efficiency-efforts

The EOG proposal did not raise an impractical point for shareholder deliberation but rather a topic that is routinely voted upon and well supported by shareholders. Because the same proposal model submitted to EOG Resources had been deemed in prior no-action decisions to not constitute micromanagement,[4] the proposal on GHG targets has been filed at dozens of companies since 2010 and has received voting support averaging above 20%.[5] In 2018, at Emerson Electric and Fluor Corporation the proposals earned around 40% support. The proposal has also been withdrawn by investors at numerous companies that have agreed to set targets. Overall, more than 400 companies have committed to set science-based targets for GHG emission reductions to date.

The change in approach could have wide-ranging and deleterious implications, including limiting the availability of shareholder proposals at companies that already have disclosure and policy frameworks in place, even if a significant portion of shareholders might view the companies' efforts as boilerplate or grossly inadequate.

**3. New approach to Rule 14a-8(i)(9)
encourages gamesmanship.**

The Staff also developed a new approach to the interpretation of Rule 14a-8(i)(9) this season by allowing management to exclude proposals by simply offering a proposal to ratify the status quo after receipt of a shareholder's governance proposal. This sequence implied that the management proposal was intended to "conflict-out" a previously submitted shareholder proposal.

Ratification of the status quo in lieu of a shareholder's proposal, besides being unnecessary, means that shareholders only get to hear one side of an issue. Although a Staff requirement for the proxy statement to mention the excluded proposal may help inform investors, such an approach may undermine the rights and logic of shareholders being able to request specific reforms. Voting only on ratification of an existing policy eliminates the opportunity to debate the merits of a shareholder proposed change. As a precedent and invitation to additional corporate gamesmanship, this is highly problematic.

**4. Board of Directors findings should discuss the
substance of proposals and include adequate documentation.**

Many of the signatories believe that the invitation of SLB 14I for board of directors "findings" is misguided, because it gives an inappropriate level of credence to the board over shareholder interests. Others welcome the possibility of earlier board consideration of the substantive issues

[4] Some examples of proposals where micromanagement assertions were rejected on proposals seeking the establishment of GHG goals include *ONEOK, Inc.* (February 25, 2008), *Great Plains Energy Incorporated* (February 5, 2015), *FirstEnergy Corp.* (March 4, 2015), *Norfolk Southern Corporation* (January 15, 2010), *Centex Corporation* (March 18, 2008), *Standard Pacific Corp.* (February 28, 2008), *OGE Corporation* (Feb. 27, 2008); see also, decisions rejecting micromanagement on requests to consider net zero GHG goals, *TJX Companies Inc.* (March 13, 2017), *PayPal Holdings, Inc.*(March 13, 2017).

[5] Data source: Heidi Welsh, *Sustainable Investments Institute*, May 22, 2018.

raised by a proposal.

In the recent season, several no-action decisions declined to grant relief when the request failed to discuss the substance behind the board's determination of a lack of significance. We believe that all parties would be better served if the Staff clarified the need for the board section of a no-action request to include analysis of the substance and significance of the proposal, as well as documentation regarding the content of the board process. This could help to avoid the need for proponents to engage in costly books and records requests, which might otherwise result from board assertions of a proposal's "insignificance" to the company.

Investors have long used shareholder proposals to shed light on essential issues not yet on the agenda of boards and management. Because these proposals have helped companies to avoid many risks (such as looming liabilities or reputational harm) and also helped them to capitalize on unrecognized opportunities, the threshold for sufficiency of board findings should remain high, and the role of proponent responses in relation to board findings should be clarified.

Otherwise the Staff risks adopting a system that supplants investor voices (expressed through voting on shareholder-sponsored proposals) with board opinions, including boards' perfunctory adoption of positions drafted by management or counsel, even on matters where there is inadequate board oversight.

We respectfully request an opportunity for a small group of representatives of our organizations to meet with appropriate staff of the Division of Corporation Finance at the earliest convenience to discuss these concerns, preferably in advance of the stakeholder forum, so that the conversations in the forum itself may be most productive. Thank you.

Sincerely,

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