DIVISION OF
CORPORATION FINANCE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549-4561

March 30, 2011

John D. Hancock
Foley Hoag LLP
Seaport West
155 Seaport Boulevard
Boston, MA 02210-2600

Re: KVH Industries, Inc.
Incoming letter dated February 7, 2011

Dear Mr. Hancock:

This is in response to your letter dated February 7, 2011 concerning the shareholder proposal submitted to KVH by Morris Propp. We also have received letters from the proponent dated February 9, 2011 and February 13, 2011. Our response is attached to the enclosed photocopy of your correspondence. By doing this, we avoid having to recite or summarize the facts set forth in the correspondence. Copies of all of the correspondence also will be provided to the proponent.

In connection with this matter, your attention is directed to the enclosure, which sets forth a brief discussion of the Division's informal procedures regarding shareholder proposals.

Sincerely,

Gregory S. Belliston
Special Counsel

Enclosures

cc: Morris Propp

March 30, 2011

Response of the Office of Chief Counsel
Division of Corporation Finance

Re: KVH Industries, Inc.
Incoming letter dated February 7, 2011

The proposal directs that any employee who has sold KVH stock or options within the previous 12 months be ineligible to receive new stock option grants.

There appears to be some basis for your view that KVH may exclude the proposal under rule 14a-8(i)(7), as relating to KVH's ordinary business operations. In this regard, we note that the proposal relates to compensation that may be paid to employees generally and is not limited to compensation that may be paid to senior executive officers and directors. Proposals that concern general employee compensation matters are generally excludable under rule 14a-8(i)(7). Accordingly, we will not recommend enforcement action to the Commission if KVH omits the proposal from its proxy materials in reliance on rule 14a-8(i)(7). In reaching this position, we have not found it necessary to address the alternative bases for omission upon which KVH relies.

Sincerely,

Rose A. Zukin
Attorney-Adviser

DIVISION OF CORPORATION FINANCE
INFORMAL PROCEDURES REGARDING SHAREHOLDER PROPOSALS

The Division of Corporation Finance believes that its responsibility with respect to matters arising under Rule 14a-8 [17 CFR 240.14a-8], as with other matters under the proxy rules, is to aid those who must comply with the rule by offering informal advice and suggestions and to determine, initially, whether or not it may be appropriate in a particular matter to recommend enforcement action to the Commission. In connection with a shareholder proposal under Rule 14a-8, the Division's staff considers the information furnished to it by the Company in support of its intention to exclude the proposals from the Company's proxy materials, as well as any information furnished by the proponent or the proponent's representative.

Although Rule 14a-8(k) does not require any communications from shareholders to the Commission's staff, the staff will always consider information concerning alleged violations of the statutes administered by the Commission, including argument as to whether or not activities proposed to be taken would be violative of the statute or rule involved. The receipt by the staff of such information, however, should not be construed as changing the staff's informal procedures and proxy review into a formal or adversary procedure.

It is important to note that the staff's and Commission's no-action responses to Rule 14a-8(j) submissions reflect only informal views. The determinations reached in these no-action letters do not and cannot adjudicate the merits of a company's position with respect to the proposal. Only a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials. Accordingly a discretionary determination not to recommend or take Commission enforcement action, does not preclude a proponent, or any shareholder of a company, from pursuing any rights he or she may have against the company in court, should the management omit the proposal from the company's proxy material.

From: ***FISMA & OMB Memorandum M-07-16***
Sent: Sunday, February 13, 2011 12:58 PM
To: shareholderproposals
Subject: KVH Industries

February 13, 2011

U.S. Securities and Exchange Commission
Division of Corporate Finance
Office of Chief Counsel
100 F Street, N.E.
Washington, D.C. 20549

Re: KVH Industries, Inc. Shareholder Proposal Under Rule 14a-8

Ladies and Gentlemen:

I wish to formally withdraw my proposal from the upcoming proxy statement of KVH Industries.

Yours truly,

Morris Propp

MORRIS PROPP

February 9, 2011

U.S. Securities and Exchange Commission
Division of Corporate Finance
Office of Chief Counsel
100 F Street, N.E.
Washington, D.C. 20549

Re: KVH Industries, Inc. Shareholder Proposal Under Rule 14a-8

Ladies and Gentlemen:

I received KVHI's counsel objections to inclusion of my proposal in their upcoming proxy statement. I also read, with interest, their opinions as to why my proposal is technically deficient. To me this is an issue of form versus substance and I am not swayed.

KVHI's "incentive" option program has little to do with incentive and more to do with obfuscating the true compensation of insiders and the Company's true financial performance. The idea, going forward, is for regulators to stop, as much as possible, insider abuse and contrivance at the expense of shareholders. Transparency is good.

I am an investor in KVHI. Objecting to badly behaving insiders is not my profession nor do I wish it to be. It is unpleasant work that needs to be done but that does not compensate. One data service indicates that KVHI issued 190,500 options and/or shares to 11 insiders during the last 12 months. The same service indicates that 8 insiders sold 224,075 shares during roughly the same period. This pattern has continued over the past years. My data service indicates that in the past 12 months 64 form 4's have been filed by insiders. The awarding and subsequent cashing-in of options seems to be an important, regular, time-consuming aspect of this small company's operations. I call this gaming the system. It should stop but the Board is actively in the game themselves.

Insiders are not using "incentive" option grants to accumulate shares. Rather they are watering the stock so as to create a special layer of compensation under shareholders' radar. Call a spade a spade. If option grants are being used consistently to effectively augment cash salaries then we have something other than an "incentive option plan." That the board is participating, pari passu, is cause for concern and it is understandable that they would not want my proposal aired to shareholders. If I awarded stock as an incentive to an insider I would be upset to see it immediately sold for cash. Such behavior is systemic at KVHI and shareholders may object to it. I do.

I accept the technical deficiencies of my proposal as set forth by KVHI's counsel. I therefore suggest that the proposal stand and be included in the proxy filing but that the results be non-binding.

Yours truly,

Morris Propp

FISMA & OMB Memorandum M-07-16

FISMA & OMB Memorandum M-07-16 • EMAIL: MPROPP@POST.HARVARD.EDU

FOLEY HOAG LLP

Seaport West
155 Seaport Boulevard
Boston, MA 02210-2600

617 832 1000 *main*
617 832 7000 *fax*

February 7, 2011

John D. Hancock
617 832 1201 *direct*
jhancock@foleyhoag.com

Via E-Mail (shareholderproposals@sec.gov)

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street, N.E.
Washington, DC 20549

Re: KVH Industries, Inc.
Shareholder Proposal Under Rule 14a-8

Ladies and Gentlemen:

On behalf of our client KVH Industries, Inc., a Delaware corporation (the "Company"), and pursuant to Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), we hereby request confirmation that the staff (the "Staff") of the Securities and Exchange Commission (the "Commission") will not recommend enforcement action against the Company if the Company were to omit the proposal submitted by Morris Propp (the "Proponent") from its proxy materials for its annual meeting of shareholders (the "Annual Meeting") to be held in June 2011 (the "2011 Proxy Materials"). The Company currently anticipates that it will file its definitive proxy statement and form of proxy with respect to the Annual Meeting with the Commission no earlier than 80 calendar days after the date of this letter. Pursuant to Rule 14a-8(j), we have included a copy of the Proponent's proposal and the supporting opinion of counsel required by Rule 14a-8(j)(2)(iii). A copy of this letter is also being sent concurrently to the Proponent as notice of the Company's intent to exclude the Proponent's proposal from the 2011 Proxy Materials.

I. The Proposal

By e-mail dated December 14, 2010, the Proponent submitted the following proposal (the "Proposal") for the Company's next annual meeting:

> "RESOLVED, that any employee who has sold KVH stock or options within the previous 12 months shall be ineligible to receive new stock option grants."

A copy of the Proposal and related correspondence is included as Exhibit A to this letter.

II. Bases for Exclusion

We believe that the Proposal may be properly excluded from the 2011 Proxy Materials pursuant to:

- Rule 14a-8(i)(1) because implementation of the Proposal would be improper under the Delaware General Corporation Law;
- Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate the Delaware General Corporation Law;
- Rule 14a-8(i)(7) because the Proposal pertains to the compensation of all employees, a matter relating to the Company's ordinary business operations; and
- Rule 14a-8(i)(3) because the Proposal is misleading and vague and contrary to the Commission's Proxy Rules and Regulations.

ANALYSIS

III. The Proposal May Be Excluded Under Rule 14a-8(i)(1) Because It Is An Improper Matter for Shareholder Action Under the Delaware General Corporation Law

Rule 14a-8(i)(1) permits a company to omit a shareholder proposal from its proxy materials if the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the Company's organization.

(A) The Proposal mandates action on matters that, under Delaware law, fall within the powers of a company's board of directors.

Section 141(a) of Delaware General Corporation Law states that "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the

direction of a board of directors, except as may be otherwise provided" by statute or its certificate of incorporation. As explained in more detail in the supporting opinion of Richards, Layton & Finger, P.A., attached hereto as Exhibit B, nothing in the Delaware General Corporation Law or the Company's Certificate of Incorporation revokes the power of the Board of Directors to determine employee compensation and grants that power to the shareholders. Accordingly, under Delaware law and the Company's Certificate of Incorporation, only the Company's Board of Directors has the authority to decide whether or not to grant stock options to the Company's employees. Because the Proposal purports to exercise authority not granted by statute or the Company's Certificate of Incorporation to the Company's shareholders, the Proposal is not a proper subject for action by the Company's shareholders.

(B) The Proposal is not properly cast as a recommendation or request that the Board of Directors take specified action.

The Note to Rule 14a-8(i)(1) states that "[d]epending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders." The Proposal mandates, rather than requests, that "any employee who has sold KVH stock or options within the previous 12 months shall be ineligible to receive new stock option grants." The Proposal is not precatory and is not cast as a recommendation or request that the Board of Directors take specified action. The Staff has consistently found that binding proposals are excludable unless amended by the proponent to make them precatory. *See, e.g., Phillips Petroleum Company* (March 13, 2002) (proposal requiring a formula limiting increases in the salaries of the company's chairman and other officers); *Columbia Gas System* (January 16, 1996) (proposal requiring a limitation on salary increase and option grants).

The Staff has consistently concurred that a shareholder proposal mandating or directing that a company's board of directors take certain actions is inconsistent with the discretionary authority granted to the board of directors under state law and violates Rule 14a-8(i)(1). Accordingly, the Proposal is not a proper subject for shareholder action under Delaware law since it mandates that the Board refrain from granting stock options to certain employees, a matter clearly within its discretion and purview.

The Company therefore respectfully requests that the Staff concur with its opinion that the Proposal may be properly excluded from the 2011 Proxy Materials pursuant to Rule 14a-8(i)(1) because it is not a proper subject for shareholder action.

IV. The Proposal May Be Excluded Under Rule 14a-8(i)(2) Because Its Adoption and Implementation Would Cause the Company to Violate the Delaware General Corporation Law

The Proposal is properly excludable under Rule 14a-8(i)(2) because the Proposal, if adopted and implemented, would cause the Company to violate the Delaware General Corporation Law. As described in detail in the accompanying opinion of Richards, Layton & Finger, P.A., adoption and implementation of the Proposal would impose a limitation on the authority of the Board of Directors in violation of Sections 141, 122, 152, 153 and 157 of the Delaware General Corporation Law.

The Company therefore respectfully requests that the Staff concur with its opinion that the Proposal may be properly excluded from the 2011 Proxy Materials pursuant to Rule 14a-8(i)(2) because its adoption and implementation would cause the Company to violate the Delaware General Corporation Law.

V. The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Deals with the Compensation of All Employees, a Matter Relating to the Company's Ordinary Business Operations

The Proposal is properly excludable under Rule 14a-8(i)(7) because the Proposal pertains to general employee compensation, a matter of the Company's ordinary business operations. Rule 14a-8(i)(7) permits a company to omit from its proxy materials a shareholder proposal that relates to the company's "ordinary business operations." According to the Commission's Release accompanying the 1998 amendments to Rule 14a-8, the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting." Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release"). In the 1998 Release, the Commission described the two "central considerations" for the ordinary business exclusion. The first was that certain tasks were "so fundamental to management's ability to run a company on a day-to-day basis" that they could not be subject to direct shareholder oversight. The second consideration related to "the degree to which the proposal seeks to 'micro-manage' the company by 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." In accordance with this administrative history, the Staff has permitted the exclusion of shareholder proposals under Rule 14a-8(i)(7) if they concern "general employee compensation issues." Staff Legal Bulletin No. 14A (July 12, 2002) ("SLB 14A"). In SLB 14A, the Staff stated, "[s]ince 1992, we have applied a bright-line analysis to proposals concerning equity or cash compensation.... We agree with the view of companies that they may exclude proposals that relate to general employee compensation matters in reliance on Rule 14a-8(i)(7)."

The Proposal proposes that certain employees be ineligible to receive new stock option grants. This Proposal, by its terms, is not limited to the senior executive officers of the Company. The Staff has consistently concurred in the exclusion of proposals that seek to regulate compensation practices with respect to the general workforce because they encroach upon the Company's "ordinary business operations." *See, e.g., 3M Company* (March 6, 2008) (permitting the exclusion under Rule 14a-8(i)(7) of a proposal regarding the variable compensation of high-level employees); *Alliant Energy Corporation* (February 4, 2004) (permitting the exclusion of a proposal determining the compensation of the president, "all levels of vice presidents," the CEO, CFO and "all levels of top management" based on a specified formula); *Ascential Software Corp.* (April 4, 2003) (permitting the exclusion of a proposal addressing compensation policies and practices beyond senior executive compensation); *Lucent Technologies* (November 6, 2001) (permitting exclusion of proposal restricting compensation paid to "ALL officers and directors"); *FPL Group, Inc.* (February 3, 1997) (permitting exclusion of a proposal restricting compensation paid to "middle and executive management"). The Proposal, like the proposals in the no-action letters cited above, concerns general compensation matters because it addresses the award of stock options to all employees, not just senior executive officers. Because the Proposal seeks to regulate the compensation of any employee who may be eligible to receive stock options, the Proposal also seeks to "micro-manage" the routine business matter of employee compensation that is entrusted to corporate management.

The Company therefore respectfully requests that the Staff concur with its opinion that the Proposal may be properly excluded from the 2011 Proxy Materials pursuant to Rule 14a-8(i)(7) because it relates to the Company's ordinary business matters.

VI. The Proposal May Be Excluded Under Rule 14a-8(i)(3) Because It Is Impermissibly Vague and Indefinite so as To Be Inherently Misleading

The Company also believes that it may properly exclude the Proposal from the 2011 Proxy Materials under Rule 14a-8(i)(3), which permits the exclusion of a proposal if the proposal is contrary to any of the Commission's proxy rules, including Rule 14a-9, which prohibits false or misleading statements in proxy materials. The Staff has taken the position that a proposal may be excluded on this ground if the proposal is so vague and indefinite "that neither the stockholders voting on the proposal, nor the company, would be able to determine with reasonable certainty what measures the company would take if the proposal was approved." *See Chevron Corporation* (January 29, 1998); *Compass Bancshares, Inc.* (January 13, 1998). The Staff has stated that such vague and indefinite proposals are "misleading, in that, any action ultimately taken by the company upon the implementation of the proposals could be quite different from the type of action envisioned by the stockholders at the time their votes were cast." *See, E.I. du Pont de Nemours & Company, Inc.* (February 8, 1977).

The Proposal purports to make certain employees of the Company ineligible to receive stock option grants, yet the Proposal does not define these employees with any degree of precision. The Proposal relates to any "employee who has sold KVH stock or options within the previous 12 months," but the period "within the previous 12 months" is ambiguous. There is no clear referent for the word "previous." Neither the Company nor any shareholders asked to vote on the Proposal could determine whether this phrase is intended to refer to the 12-month period preceding the submission of the Proposal by the Proponent to the Company, the 12-month period preceding the submission of the Proposal to the shareholders at the Annual Meeting, the 12-month period preceding any decision to grant stock options to an employee, or some other 12-month period. The Staff has granted no-action relief where the shareholder proposal is subject to differing interpretations. *See, e.g., General Motors Corporation* (April 2, 2008) (allowing omission of shareholder proposal that requested to implement a "leveling formula" to calculate executive compensation); *Exxon Corporation* (January 29, 1992) (permitting exclusion of a shareholder proposal because it contained vague terms that were subject to differing interpretations); *Fugua Industries Inc.* (March 12, 1991) (the "meaning and application of terms and conditions ... in proposal would have to be made without guidance from the proposal and would be subject to differing interpretation."). Further, even if the relevant 12-month period were clear, on its face the Proposal would appear to apply to a current employee of the Company who sold "KVH stock or options" during that 12-month period, regardless of whether the individual was employed by the Company at the time of sale, a result so counterintuitive that the Company and shareholders being asked to vote on the Proposal would likely infer that another meaning was intended. Nonetheless, if the Proposal were to be approved by shareholders in its present form, there can be no certainty whether shareholders intended to endorse one reading of the seemingly plain language or another, more plausible reading.

Further, the Proponent asserts in his Statement of Support that "KVH employees have a consistent history of watering the common stock of the Company, regularly exercising options and selling stock into the open market." The Proponent provides no factual support for this assertion. Moreover, although some Forms 4 filed by executive officers do disclose the exercise of stock options and the sale of the underlying shares from time to time, this information is limited to a small group of senior executives of the Company, and the Company is not aware of any publicly available information regarding the sale practices of other employees or the frequency of such sales. Accordingly, the Company believes that the Proponent could not reasonably have a factual basis for the quoted assertions in the Statement of Support. As a result, because the assertions in the Statement of Support appear to have been made without any factual basis, the Company believes the Statement of Support is inherently misleading.

The Company therefore respectfully requests that the Staff concur with its opinion that the Proposal may be properly excluded from the 2011 Proxy Materials pursuant to Rule 14a-8(i)(3) because (i) the Proposal is so vague and indefinite that the Company's

shareholders would be confused regarding the ramifications of voting for or against the Proposal and (ii) the Proposal includes misleading statements.

VII. Conclusion

For the foregoing reasons, the Company respectfully requests that the Staff concur with its view that the Proposal may be properly omitted from the Company's 2011 Proxy Materials and that the Staff not recommend any enforcement action to the Commission if the Company omits the Proposal from its 2011 Proxy Materials.

If you have any questions or need additional information, please do not hesitate to contact me at (617) 832-1201.

Sincerely,

John D. Hancock

Attachments

cc: Mr. Morris Propp
Mr. Martin A. Kits van Heyningen
Mr. Patrick J. Spratt
Felise Feingold, Esq.

Exhibit A

*** FISMA & OMB Memorandum M-07-16 ***

From:
Date: December 14, 2010 8:22:31 AM EST
To: ir@kvh.com
Subject: shareholder proposal

i formally submit the following shareholder proposal for the next annual meeting.

morris propp

MORRIS PROPP

December 14, 2010

To the Secretary and Board of Directors
KVH Industries
50 Enterprise Center
Middletown, Rhode Island 02842

To the Secretary and the Board:

I, Morris Propp, am a current shareholder of KVH and assert that I have been a shareholder of KVH for more than one year, owning 5,000 shares of common stock in my own name. I represent that I intend to hold my shares through the date of the next annual meeting. I make the following proposal:

RESOLVED, that any employee who has sold KVH stock or options within the previous 12 months shall be ineligible to receive new stock option grants.

Shareholder Statement of Support: In the Company's own words theirs is a "stock incentive plan." Stock options do indeed provide an incentive. However, where an employee uses a stock option to replace stock or options that are sold the incentive for that grant is gone, the purpose of the award is undermined. If the Company wishes to reward performance it has ample ability to do so with cash bonuses and/or salary hikes. KVH employees have a consistent history of watering the common stock of the Company, regularly exercising options and selling stock into the open market. This should stop immediately.

*** FISMA & OMB Memorandum M-07-16 ***
*** FISMA & OMB Memorandum M-07-16 *** • EMAIL: MPROPP@POST.HARVARD.EDU

Exhibit B

RICHARDS LAYTON & FINGER

February 7, 2011

KVH Industries
50 Enterprise Center
Middletown, RI 02842

Re: Stockholder Proposal Submitted by Morris Propp

Ladies and Gentlemen:

We have acted as special Delaware counsel to KVH Industries, Inc., a Delaware corporation (the "Company"), in connection with a proposal (the "Proposal") submitted by Morris Propp (the "Proponent") that the Proponent intends to present at the Company's 2011 annual meeting of stockholders (the "Annual Meeting"). In this connection, you have requested our opinion as to certain matters under the laws of the State of Delaware.

For the purpose of rendering our opinion as expressed herein, we have been furnished and have reviewed the following documents:

(i) the Amended and Restated Certificate of Incorporation of the Company, as filed with the Secretary of State of the State of Delaware (the "Secretary of State") on April 8, 1996, the Certificate of Amendment of Certificate of Incorporation of the Company, as filed with the Secretary of State on March 23, 2001, and the Certificate of Amendment of Certificate of Incorporation of the Company, as filed with the Secretary of State on July 28, 2010 (collectively, the "Certificate of Incorporation");

(ii) the Amended, Restated and Corrected By-laws of the Company, as amended February 1, 1996 and May 23, 2001, corrected January 16, 2004, and amended July 26, 2007 (the "Bylaws"); and

(iii) the Proposal and the supporting statement thereto.

With respect to the foregoing documents, we have assumed: (a) the genuineness of all signatures, and the incumbency, authority, legal right and power and legal capacity under all applicable laws and regulations, of each of the officers and other persons and entities signing or whose signatures appear upon each of said documents as or on behalf of the parties thereto; (b) the conformity to authentic originals of all documents submitted to us as certified, conformed, photostatic, electronic or other copies; and (c) that the foregoing documents, in the forms submitted to us for our review, have not been and will not be altered or amended in any respect material to our opinion as expressed herein. For the purpose of rendering our opinion as expressed herein, we have not reviewed any document other than the documents set forth above,

and, except as set forth in this opinion, we assume there exists no provision of any such other document that bears upon or is inconsistent with our opinion as expressed herein. We have conducted no independent factual investigation of our own, but rather have relied solely upon the foregoing documents, the statements and information set forth therein, and the additional matters recited or assumed herein, all of which we assume to be true, complete and accurate in all material respects.

The Proposal

The Proposal reads as follows:

> RESOLVED, that any employee who has sold KVH stock or options within the previous 12 months shall be ineligible to receive new stock option grants.

Discussion

You have asked our opinion as to (i) whether the Proposal is a proper subject for action by stockholders under Delaware law, and (ii) whether the Proposal, if adopted and implemented, would violate the General Corporation Law of the State of Delaware (the "General Corporation Law"). For the reasons set forth below, in our opinion, the Proposal is not a proper subject for action by the stockholders of the Company under Delaware law because it would impermissibly infringe on the managerial authority of the Board of Directors of the Company (the "Board") to determine the compensation of the employees of the Company. In addition, for the reasons set forth below, in our opinion, the Proposal, if adopted and implemented, would impose limitations on the Board's authority in violation of Sections 141, 122, 152, 153 and 157 of the General Corporation Law.

As a general matter, the directors of a Delaware corporation are vested with substantial discretion and authority to manage the business and affairs of the corporation. Section 141(a) of the General Corporation Law, 8 Del. C. § 141(a), provides in pertinent part as follows:

> The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.

Significantly, if there is to be any variation from the mandate of Section 141(a) of the General Corporation Law, it can only be as "otherwise provided in [the General Corporation Law] or in its certificate of incorporation." 8 Del. C. § 141(a); see also Lehrman v. Cohen, 222 A.2d 800, 808 (Del. 1966). The Certificate of Incorporation does not grant the stockholders of the Company power to manage the Company with respect to any specific matter or any general class

of matters. Thus, under the General Corporation Law, the Board holds the full and exclusive authority to manage the Company.

The distinction set forth in the General Corporation Law between the role of stockholders and the role of the board of directors is well established. As the Delaware Supreme Court has stated, "[a] cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984). See also CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d. 227, 232 (Del. 2008) ("[I]t is well-established that stockholders of a corporation subject to the DGCL may not directly manage the business and affairs of the corporation."); Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1291 (Del. 1998) ("One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation.") (footnote omitted). This principle has long been recognized in Delaware. Thus, in Abercrombie v. Davies, 123 A.2d 893, 898 (Del. Ch. 1956), rev'd on other grounds, 130 A.2d 338 (Del. 1957), the Court of Chancery stated that "there can be no doubt that in certain areas the directors rather than the stockholders or others are granted the power by the state to deal with questions of management policy." Similarly, in Maldonado v. Flynn, 413 A.2d 1251, 1255 (Del. Ch. 1980), rev'd on other grounds sub nom. Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981), the Court of Chancery stated:

> [T]he board of directors of a corporation, as the repository of the power of corporate governance, is empowered to make the business decisions of the corporation. The directors, not the stockholders, are the managers of the business affairs of the corporation.

Id.; 8 Del. C. § 141(a). See also Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Adams v. Clearance Corp., 121 A.2d 302 (Del. 1956); Mayer v. Adams, 141 A.2d 458 (Del. 1958); Lehrman, 222 A.2d 800.

The rationale for these statements is as follows:

> Stockholders are the equitable owners of the corporation's assets. However, the corporation is the legal owner of its property and the stockholders do not have any specific interest in the assets of the corporation. Instead, they have the right to share in the profits of the company and in the distribution of its assets on liquidation. Consistent with this division of interests, the directors rather than the stockholders manage the business and affairs of the corporation and the directors, in carrying out their duties, act as fiduciaries for the company and its stockholders.

Norte & Co. v. Manor Healthcare Corp., 1985 WL 44684, at *3 (Del. Ch. Nov. 21, 1985) (citations omitted). As a result, directors may not delegate to others their decision making authority on matters as to which they are required to exercise their business judgment. See Rosenblatt v. Getty Oil Co., 1983 WL 8936, at *18-19 (Del. Ch. Sept. 19, 1983), aff'd, 493 A.2d 929 (Del. 1985); Field v. Carlisle Corp., 68 A.2d 817, 820-21 (Del. Ch. 1949); Clarke Mem'l College v. Monaghan Land Co., 257 A.2d 234, 241 (Del. Ch. 1969). Nor can the board of directors delegate or abdicate this responsibility in favor of the stockholders themselves. Paramount Commc'ns Inc. v. Time Inc., 571 A.2d 1140, 1154 (Del. 1989); Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985).

In exercising their discretion concerning the management of the corporation's affairs, directors are not obligated to act in accordance with the desires of the holders of a majority of the corporation's shares. See Paramount Commc'ns Inc. v. Time Inc., 1989 WL 79880, at *30 (Del. Ch. July 14, 1989) ("The corporation law does not operate on the theory that directors, in exercising their powers to manage the firm, are obligated to follow the wishes of a majority of shares."), aff'd, 571 A.2d 1140 (Del. 1989). For example, in Abercrombie, 123 A.2d 893, the plaintiffs challenged an agreement among certain stockholders and directors which, among other things, purported to irrevocably bind directors to vote in a predetermined manner even though the vote might be contrary to their own best judgment. The Court of Chancery concluded that the agreement was an unlawful attempt by stockholders to encroach upon directorial authority:

> So long as the corporate form is used as presently provided by our statutes this Court cannot give legal sanction to agreements which have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters.
>
> Nor is this, as defendants urge, merely an attempt to do what the parties could do in the absence of such an [a]greement. Certainly the stockholders could agree to a course of persuasion but they cannot under the present law commit the directors to a procedure which might force them to vote contrary to their own best judgment.
>
> I am therefore forced to conclude that [the agreement] is invalid as an unlawful attempt by certain stockholders to encroach upon the statutory powers and duties imposed on directors by the Delaware corporation law.

Abercrombie, 123 A.2d at 899-900 (citations omitted).

A facet of the management of the business and affairs of a Delaware corporation is the concept that the board of directors, or persons duly authorized to act on its behalf, directs the decision-making process regarding (among other things) the compensation of employees. See 8 Del. C. § 122(5) (empowering Delaware corporations to "[a]ppoint such officers and agents as the business of the corporation requires and to pay or otherwise provide for them suitable compensation"); 8 Del. C. § 122(15) (empowering Delaware corporations to offer stock option, incentive, and other compensation plans for directors, officers, and employees); In re Citigroup Inc. S'holder Deriv. Litig., 964 A.2d 106, 138 (Del. Ch. 2009) ("The directors of a Delaware corporation have the authority and broad discretion to make executive compensation."); Wilderman v. Wilderman, 315 A.2d 610, 614 (Del. Ch. 1974) ("The authority to compensate corporate officers is normally vested in the board of directors" pursuant to Section 122(5).). Delaware courts have consistently upheld the principle that a board of directors has "broad discretion to set executive compensation." White v. Panic, 783 A.2d 543, 553 n.35 (Del. 1991); see also In re Walt Disney Co. Derivative Litig., 731 A.2d 342, 362 (Del. Ch. 1998) ("[I]n the absence of fraud, this Court's deference to directors' business judgment is particularly broad in matters of executive compensation."); Lewis v. Hirsch, 1994 WL 263551, at *3 (Del. Ch. June 1, 1994) (executive compensation is "ordinarily left to the business judgment of a company's board of directors"). This authority includes the power to compensate employees appropriately. Pogostin v. Rice, 1983 WL 17985, at *4 (Del. Ch. Aug. 12, 1983), aff'd, 480 A.2d 619 (Del. 1984) (noting that compensation levels are within the discretion of the board of directors); Haber v. Bell, 465 A.2d 353, 359 (Del. Ch. 1983) ("A corporation, however, may utilize stock options, purchases, and other means ... to pay compensation to its employees. And generally directors have the sole authority to determine compensation levels."). Accordingly, absent any provision in the Certificate of Incorporation to the contrary, the Board has the sole discretion to determine the appropriate compensation for its officers and employees in the exercise of its power and authority to manage the business and affairs of the Company.[1] Therefore, it is not permissible under Delaware law for the stockholders to restrict the Board's discretion in exercising its managerial authority to determine the compensation for the Company's employees. Consistent with the foregoing, Lawrence A. Hamermesh, Attorney-Fellow for the Office of Chief Counsel, Division of Corporation Finance, U.S. Securities and Exchange Commission, has endorsed the view that stockholder proposals which purport to limit the power of a board of directors in matters of executive compensation are impermissible intrusions upon the province of the board. See Lawrence A. Hamermesh, The Shareholder Rights By-law: Doubts from Delaware, 5

[1] Indeed, Section 141(h) of the General Corporation Law provides that "[u]nless otherwise restricted by the certificate of incorporation or bylaws, the board of directors shall have the authority to fix the compensation of directors." 8 Del. C. § 141(h). The use of the phrase "[u]nless otherwise restricted by the certificate of incorporation or bylaws" in Section 141(h) demonstrates that had the drafters of the General Corporation Law intended for stockholders of the Company to have the power to restrict the authority of the Board with respect to employee compensation (such as through a stockholder adopted by-law), the drafters were well aware of how to accomplish that.

Corporate Governance Advisor 9 (Jan./Feb. 1997) ("[A] by-law that purported to preclude the board of directors from adopting certain forms of executive compensation ... would constitute an impermissible intrusion into the directors' statutory management authority.").[2]

Delaware law does not permit stockholders to deprive directors of the ability to exercise their full managerial power in circumstances where their fiduciary duties would otherwise require them to exercise their judgment. See CA, Inc., 953 A.2d at 239. Yet, that is exactly what the Proposal attempts to do, in that it would intrude upon the Board's discretion with respect to employee compensation and prevent the Board from granting new stock options to any employees who have sold shares of the Company's stock within the previous 12 months regardless of the Board's judgment as to whether the granting of stock options to such employees is in the best interests of the Company and its stockholders. Therefore, because the Proposal would "have the effect of removing from directors in a very substantial way their duty to use their own best judgment" in determining whether to grant stock options to employees, Abercrombie, 123 A.2d at 899, in our view, the Proposal is not a proper subject for action by the stockholders of the Company under Delaware law.[3]

Moreover, in our view, the Proposal, if adopted and implemented, would impose a limitation on the Board's authority in violation of Sections 141, 122, 152, 153 and 157 of the General Corporation Law.

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[2] See also R. Franklin Balotti and Daniel A. Dreisbach, The Permissible Scope of Shareholder Bylaw Amendments in Delaware, 1 Corporate Governance Advisor 22 (Oct./Nov. 1992) ("Any proposal which mandates a certain action by the board or infringes upon the discretion of the board will likely be held unreasonable..."). We note that Messrs. Balotti and Dreisbach are directors of Richards, Layton & Finger, P.A.

[3] The limitations that the Proposal would impose on the Board's ability to issue options also raises public policy concerns. As discussed above, under the construct of Delaware corporate law, the Board manages the business and affairs of the Company. In order to carry out its mandate, the Board is granted broad and varied powers. Thus, the Board is granted the power to determine compensation, in the form of cash, stock, options, property and otherwise, so as to be in a position to attract and retain the most qualified employees for the Company. However, the Board's exercise of these powers is not unfettered. In exercising its managerial authority, the Board is subject to fiduciary duties which require the Board to use its powers in a manner to benefit the Company and its stockholders. Thus, any action of the Board, including the issuance of stock options, is subject to challenge as being a breach of its fiduciary duties. To permit the Proposal would allow a stockholder (who owes no fiduciary duties to the Company or the other stockholders) to usurp the Board's authority and dictate the terms of employee compensation. Thus, compensation determinations could be made without the corresponding risk of challenge for breach of fiduciary duty. As a result, the "carefully crafted balance of director power tested against the law of fiduciary duties" would be upset. Frederick H. Alexander and James D. Honaker, Power to the Franchise or the Fiduciaries?: An Analysis of the Limits on Stockholder Activist Bylaws, 33 Del. J. Corp. L. 749, 762 (2008).

As discussed above, under the General Corporation Law, the Board holds the full and exclusive authority to manage the Company. Because the Proposal impermissibly limits the Board's ability to manage the business and affairs of the Company by, among other things, restricting the Board's ability to determine the form of compensation for the Company's employees, the Proposal would violate Section 141(a) of the General Corporation Law. Indeed, the Delaware Supreme Court's decision in Quickturn supports the conclusion that the Proposal would contravene Section 141(a) and, therefore, not be valid under the General Corporation Law. At issue in Quickturn was the validity of a "Delayed Redemption Provision" of a stockholder rights plan, which, under certain circumstances, would prevent a newly elected Quickturn board of directors from redeeming, for a period of six months, the rights issued under Quickturn's rights plan. The Delaware Supreme Court held that the Delayed Redemption Provision was invalid as a matter of law because it impermissibly would deprive a newly elected board of its full statutory authority under Section 141(a) to manage the business and affairs of the corporation:

> One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation. Section 141(a) requires that any limitation on the board's authority be set out in the certificate of incorporation. The Quickturn certificate of incorporation contains no provision purporting to limit the authority of the board in any way. The Delayed Redemption Provision, however, would prevent a newly elected board of directors from completely discharging its fundamental management duties to the corporation and its stockholders for six months.... Therefore, we hold that the Delayed Redemption Provision is invalid under Section 141(a), which confers upon any newly elected board of directors full power to manage and direct the business and affairs of a Delaware corporation.

Quickturn, 721 A.2d at 1291-92 (emphasis in original; footnotes omitted). See also id., at 1292 ("The Delayed Redemption Provision 'tends to limit in a substantial way the freedom of [newly elected] directors' decisions on matters of management policy.' Therefore, 'it violates the duty of each [newly elected] director to exercise his own best judgment on matters coming before the board.'") (footnotes omitted).

In addition, the Proposal, if adopted and implemented, would impose a limitation on the Board's authority with respect to employee compensation in violation of Section 122 of the General Corporation Law. Section 122(5) of the General Corporation Law provides that "[e]very corporation created under this chapter shall have power to appoint such officers and agents as the business of the corporation requires and to pay or otherwise provide for them suitable compensation." 8 Del. C. § 122(5). In addition, Section 122(15) of the General

Corporation Law authorizes a corporation to "[p]ay pensions and establish and carry out pension, profit sharing, stock option, stock purchase, stock bonus, retirement, benefit, incentive and compensation plans, trusts and provisions for any or all of its directors, officers and employees, and for any or all of the directors, officers and employees of its subsidiaries." 8 Del. C. § 122(15). Because the Proposal purports to restrict the Board's ability to compensate certain employees by granting them stock options, the Proposal would encroach upon the Board's powers under Sections 122(5) and 122(15) of the General Corporation Law.

The Proposal, if adopted and implemented, would also impinge on the Board's powers concerning the grant, issuance, sale or other disposition of the Company's stock and stock options under Sections 152, 153 and 157 of the General Corporation Law because it would restrict the Board's ability to offer stock options on such terms and conditions as the Board may determine appropriate as a component of employee compensation. The "issuance of corporate stock is an act of fundamental legal significance having a direct bearing upon questions of corporate governance, control and the capital structure of the enterprise. The law properly requires certainty in such matters." Staar Surgical Co. v. Waggoner, 588 A.2d 1130, 1136 (Del. 1991). The function of issuance of shares lies with the board of directors and has been held to be "such a 'vitally important duty' that it cannot be delegated." Cook v. Pumpelly, 1985 WL 11549, at *9 (Del. Ch. May 24, 1985) (citing Field v. Carlisle Corp., 68 A.2d 817, 820 (Del. Ch. 1949)). See Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257 (Del. Ch. 1989) (directors are responsible for managing business and affairs of Delaware corporation and, in exercising that responsibility in connection with adoption of employee stock ownership plan, are charged with unyielding fiduciary duty to corporation and its stockholders).

Sections 152, 153 and 157 of the General Corporation Law relating to the issuance of corporate stock and options, together with Section 141(a), underscore the board's broad (and exclusive) powers and duties in this regard. Thus, Section 157 permits only the board, not the stockholders, to approve the terms of, and the instruments evidencing, rights and options. 8 Del. C. § 157. The various subsections confirm this result. Subsection 157(a) provides that "rights or options to be evidenced by or in such instrument or instruments as shall be approved by the board of directors." 8 Del. C. § 157(a). Section 157(b) provides that the terms of the stock options shall either be as stated in the certificate of incorporation or in a resolution of the board, not the stockholders. See 8 Del. C. § 157(b). Subsection 157(b) further provides that "[i]n the absence of actual fraud in the transaction, the judgment of the directors as to the consideration for the issuance of such rights or options ... shall be conclusive." 8 Del. C. § 157(b). Indeed, stockholders are nowhere mentioned in Section 157 of the General Corporation Law. The Delaware Supreme Court has thus interpreted the provisions of Section 157 literally to mean that only the board of directors may determine the terms and conditions of rights to buy stock. See Grimes v. Alteon Inc., 804 A.2d 256, 262 (Del. 2002) (invalidating a right to buy stock because, among other reasons, the CEO of the corporation rather than its board approved the right at issue). In fact, with the exception of the delegation to officers expressly permitted in Section 157(c), "directors have the exclusive right and duty to control and

implement all aspects of the creation and issuance of options and rights." 1 David A. Drexler et al., Delaware Corporation Law and Practice § 17.06, at 17-29 (2009) (emphasis added).

Similarly, Section 152 of the General Corporation Law (along with Sections 141 and 153) requires that any issuance of stock by a corporation be duly authorized by its board of directors. Among other things, Section 152 states that the consideration payable for "the capital stock to be issued by a corporation shall be paid in such form and in such manner as the board of directors shall determine.... [T]he judgment of the directors as to the value of such consideration shall be conclusive." 8 Del. C. § 152. Indeed, Section 153 sets forth the only instance where stockholders could have authority with respect to stock issuance matters. Importantly, however, Section 153 requires such authority to be in the corporation's certificate of incorporation: "[s]hares of stock with par value may be issued for such consideration, having a value not less than the par value thereof, as determined from time to time by the board of directors, or by the stockholders if the certificate of incorporation so provides." 8 Del. C. § 153(a). In the case of the Company, however, the Certificate of Incorporation does not confer any such powers on the stockholders. Collectively, Sections 152, 153 and 157 of the General Corporation Law "confirm the board's exclusive authority to issue stock and regulate a corporation's capital structure." Grimes, 804 A.2d at 261. Thus, the Proposal, which effectively imposes limits on the Board's ability to grant stock options, would, if implemented, constitute an invalid restriction on the powers of the Board under Sections 152, 153 and 157 of the General Corporation Law.[4]

Conclusion

Based upon and subject to the foregoing, and subject to the limitations stated herein, it is our opinion that: (i) the Proposal is not a proper subject for action by the stockholders of the Company under Delaware law, and (ii) the Proposal, if adopted and implemented, would violate the General Corporation Law.

The foregoing opinion is limited to the laws of the State of Delaware. We have not considered and express no opinion on the laws of any other state or jurisdiction, including federal laws regulating securities or any other federal laws, or the rules and regulations of stock exchanges or of any other regulatory body.

[4] Moreover, the Proposal is inconsistent with the Certificate of Incorporation insofar as it would restrict the Board's ability to grant options for preferred stock of the Company because the Certificate of Incorporation expressly grants the Board, not the stockholders, the authority to issue preferred stock. See Paragraph B of Article Fourth of the Certificate of Incorporation. A bylaw, let alone a mere resolution, that is inconsistent with the Certificate of Incorporation is invalid under the General Corporation Law. See 8 Del. C. § 109(b) ("The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation ..."); Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923, 929 (Del. 1990) ("[w]here a by-law provision is in conflict with a provision of the charter, the by-law provision is a 'nullity'").

The foregoing opinion is rendered solely for your benefit in connection with the matters addressed herein. We understand that you may furnish a copy of this opinion letter to the Securities and Exchange Commission in connection with the matters addressed herein and that you may refer to it in your proxy statement for the Annual Meeting, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be furnished or quoted to, nor may the foregoing opinion be relied upon by, any other person or entity for any purpose without our prior written consent.

Very truly yours,

Richards, Layton & Finger, P.A.

WJH/BVF/TNP