



DIVISION OF  
CORPORATION FINANCE

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

No Act  
PE 12/21/11



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Received SEC  
JAN 26 2012  
Washington, DC 20549

January 26, 2012

Ronald O. Mueller  
Gibson, Dunn & Crutcher LLP  
shareholderproposals@gibsondunn.com

Act: 1934  
Section: \_\_\_\_\_  
Rule: 14a-8  
Public  
Availability: 1-26-12

Re: The Dow Chemical Company  
Incoming letter dated December 21, 2011

Dear Mr. Mueller:

This is in response to your letter dated December 21, 2011 concerning the shareholder proposal submitted to Dow by Kenneth Steiner. We also have received two letters on the proponent's behalf, each of which is dated December 30, 2011. Copies of all of the correspondence on which this response is based will be made available on our website at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml>. For your reference, a brief discussion of the Division's informal procedures regarding shareholder proposals is also available at the same website address.

Sincerely,

Ted Yu  
Senior Special Counsel

Enclosure

cc: John Chevedden

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

January 26, 2012

**Response of the Office of Chief Counsel**  
**Division of Corporation Finance**

Re: The Dow Chemical Company  
Incoming letter dated December 21, 2011

The proposal requests that the board adopt a policy that, whenever possible, the chairman shall be an independent director, by the standard of the New York Stock Exchange, who has not previously served as an executive officer of Dow.

We are unable to concur in your view that Dow may exclude the proposal under rule 14a-8(i)(3). We are unable to conclude that the proposal is so inherently vague or indefinite that neither the shareholders voting on the proposal, nor the company in implementing the proposal, would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires. Accordingly, we do not believe that Dow may omit the proposal from its proxy materials in reliance on rule 14a-8(i)(3).

Sincerely,

Angie Kim  
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.

**JOHN CHEVEDDEN**

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

December 30, 2011

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

**# 1 Rule 14a-8 Proposal**  
**The Dow Chemical Company (DOW)**  
**Independent Board Chairman Topic**  
**Kenneth Steiner**

Ladies and Gentlemen:

This responds to the December 21, 2011 company request to avoid this established rule 14a-8 proposal.

It is interesting that some of the similarly worded Gibson Dunn no action requests on this same resolved text, which was also submitted to other companies, include a lengthy Item B on page 5 and others do not. This would seem to indicate mixed feelings about Item B by those who agree on avoidance of rule 14a-8 proposals.

This is to request that the Securities and Exchange Commission allow this resolution to stand and be voted upon in the 2012 proxy.

Sincerely,



John Chevedden

cc:  
Kenneth Steiner

Amy E. Wilson <aewilson@dow.com>

**JOHN CHEVEDDEN**

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

December 30, 2011

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

**# 2 Rule 14a-8 Proposal**  
**The Dow Chemical Company (DOW)**  
**Independent Board Chairman Topic**  
**Kenneth Steiner**

Ladies and Gentlemen:

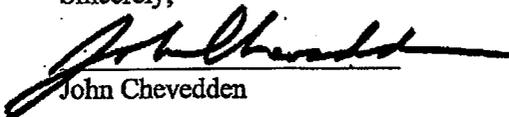
This further responds to the December 21, 2011 company request to avoid this established rule 14a-8 proposal.

The company already relies on the Director independence standard of the New York Stock Exchange according to the attached "Dow Corporate Governance Guidelines." The Dow Guidelines do not describe the substantive provisions of the NYSE standard of director independence.

Plus the "Dow Corporate Governance Guidelines" are not limited to the 500-words of rule 14a-8 proposals.

This is to request that the Securities and Exchange Commission allow this resolution to stand and be voted upon in the 2012 proxy.

Sincerely,

  
John Chevedden

cc:

Kenneth Steiner

Amy E. Wilson <aewilson@dow.com>

The Board of Directors of The Dow Chemical Company has adopted the following Corporate Governance Guidelines to assist the Board in the proper exercise of its responsibilities. The Board is elected by the Company's stockholders to oversee management and the Company's business results. The Board's purpose is to build long-term value for Dow stockholders and to ensure the continuity and vitality of the Company's businesses by setting policy for the Company, selecting the Chief Executive Officer, providing for succession planning, monitoring the performance of both the Company and the CEO, overseeing strategic planning, and providing management with appropriate advice and feedback. Management is responsible for and the Board is committed to ensuring that Dow operates in a legal and ethically responsible manner.

- Director Qualification Standards and Selection of New Director Candidates
- Director Independence
- Board Size
- Director Tenure
- Director Compensation
- Director and Executive Officer Stock Ownership Requirements
- Executive Compensation Recovery Policy
- Board Committees and Charters
- Frequency of Board and Committee Meetings
- Selection of Agenda Items for Board and Committee Meetings
- Board and Committee Materials Distributed in Advance
- Strategic Planning
- Board Leadership
- Executive Sessions of Non-Management Directors
- Board Self-Evaluation
- Director Access to Management and Independent Advisors
- Stockholder Communication with Directors
- Annual Election of Directors
- Change in Director Occupation
- Chief Executive Officer Evaluation and Succession
- Code of Business Conduct
- Director Orientation and Continuing Education
- Stockholder Approval of Preferred Stock Issuances
- Annual Review of Guidelines

## **Director Qualification Standards and Selection of New Director Candidates**

The Board has delegated to the Governance Committee the responsibility for reviewing and recommending nominees for membership on the Board. The Governance Committee recommends to the Board guidelines to evaluate candidates for Board membership to provide for a diverse and highly qualified Board. There are certain minimum qualifications for Board membership that Director candidates should possess, including strong values and discipline, high ethical standards, a commitment to full participation on the Board and its committees, relevant career experience, and a commitment to ethnic, racial and gender diversity. Candidates should possess individual skills, experience and demonstrated abilities that help meet the current needs of the Board, such as experience or expertise in some of the following areas: the chemical industry, global business, science and technology, finance and/or economics, corporate governance, public affairs, government affairs and experience as chief executive officer, chief operating officer or chief financial officer of a major company. Other factors that are considered are independence of thought, willingness to comply with Director stock ownership guidelines, meeting applicable Director independence standards (where independence is desired) and absence of conflicts of interest.

The Governance Committee shall adopt a process for identifying new Director candidates and disclose this process in each Annual Meeting proxy statement.

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## **Director Independence**

It shall be the policy of the Board that a substantial majority of the members of the Board of Directors, and all of the members of the

Audit Committee, Compensation and Leadership Development Committee and the Governance Committee, qualify as "independent directors" in accordance with applicable provisions of the Securities Exchange Act of 1934, and the rules promulgated thereunder, and the listing standards of the New York Stock Exchange as they may from time to time be amended. In addition, Audit Committee members must meet the additional, heightened independence criteria applicable to audit committee members under New York Stock Exchange listing standards. The Board of Directors shall annually review and determine the independence of each Director. The Board has adopted the standards set forth on the Company's website to assist it in assessing the independence of each director.

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## Board Size

The number of Directors shall be no less than six nor more than twenty-one. This range provides diversity of thought and experience without hindering effective discussion or diminishing individual accountability. The Governance Committee shall conduct an annual assessment of the size and composition of the Board and in consultation with the Chairman of the Board from time to time make recommendations to the Board for changes in the size of the Board as appropriate.

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## Director Tenure

Non-employee Directors will not be renominated as a Director of the Company following their 72nd birthday. Employee Directors shall retire from the Board following their 65th birthday. Employee Director who serve as Chairman of the Board may, at the election of the Board, service for up to five years as a Director after leaving the Company's executive management.

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## Director Compensation

Director compensation shall be determined by the Governance Committee. The Company's policy shall be to ensure that Director compensation is appropriate and competitive to ensure the Company's ability to attract and retain highly-qualified Directors. Director compensation will be disclosed each year in the Company's Annual Meeting proxy statement. Non-employee Directors receive a combination of cash and equity compensation for service on the Board.

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## Director and Executive Officer Stock Ownership Requirements

Requiring Directors and executive officers to have an appropriate equity ownership in the Company helps to more closely align their economic interests with those of other stockholders. Each Director shall, at all times, be an owner of the common stock of the Company. As a guideline, non-employee Directors shall own common stock of the Company equal in value to at least four times the amount of the annual Board retainer fee, with a four-year time period after first election to achieve this level. The Compensation Committee shall adopt guidelines for Dow common stock ownership by executive employees. It is against Company policy for executive officers to engage in speculative transactions in Company securities. As such, it is against Company policy for executive officers to trade in puts or calls in Company securities, or sell Company securities short.

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## Executive Compensation Recovery Policy

The Compensation and Leadership Development Committee of the Board has adopted an executive compensation recovery policy applicable to executive officers. Under this policy, the Company may recover incentive income that was based on achievement of quantitative performance targets if an executive officer engaged in grossly negligent conduct or intentional misconduct that resulted in a financial restatement or in any increase in his or her incentive income. Incentive income includes income related to annual bonuses and long term incentives.

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## Board Committees and Charters

The Governance Committee considers and makes recommendations to the Board regarding committee size, structure, composition and functioning. The Board, upon the recommendation of the Governance Committee in consultation with the Chairman of the Board, elects members to each committee and each committee's Chair.

The Board currently has four standing committees: Audit Committee, Governance Committee, Compensation and Leadership Development Committee, and Environment, Health and Safety Committee. Each standing committee shall adopt a written charter

# GIBSON DUNN

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Client: C 22013-00029

December 21, 2011

## VIA EMAIL

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: *The Dow Chemical Company*  
*Stockholder Proposal of Kenneth Steiner*  
*Exchange Act of 1934—Rule 14a-8*

Ladies and Gentlemen:

This letter is to inform you that our client, The Dow Chemical Company (the “Company”), intends to omit from its proxy statement and form of proxy for its 2012 Annual Meeting of Stockholders (collectively, the “2012 Proxy Materials”) a stockholder proposal (the “Proposal”) and statements in support thereof received from Kenneth Steiner (the “Proponent”).

Pursuant to Rule 14a-8(j), we have:

- filed this letter with the Securities and Exchange Commission (the “Commission”) no later than eighty (80) calendar days before the Company intends to file its definitive 2012 Proxy Materials with the Commission; and
- concurrently sent copies of this correspondence to the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“SLB 14D”) provide that stockholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the staff of the Division of Corporation Finance (the “Staff”). Accordingly, we are taking this opportunity to inform the Proponent that if the Proponent elects to submit additional correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

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## THE PROPOSAL

The Proposal states:

**RESOLVED:** Shareholders request that our board of directors adopt a policy that, whenever possible, the chairman of our board of directors shall be an independent director (by the standard of the New York Stock Exchange), who has not previously served as an executive officer of our Company. This policy should be implemented so as not to violate any contractual obligations in effect when this resolution is adopted. The policy should also specify how to select a new independent chairman if a current chairman ceases to be independent between annual shareholder meetings.

Further, a portion of the supporting statement states: "To foster flexibility, this proposal gives the option of being phased in and implemented when our next CEO is chosen."

A copy of the Proposal, the supporting statement and related correspondence with the Proponent is attached to this letter as Exhibit A.

## BASIS FOR EXCLUSION

We believe that the Proposal may properly be excluded from the 2012 Proxy Materials pursuant to Rule 14a-8(i)(3) because the Proposal is impermissibly vague and indefinite so as to be inherently misleading in that:

- the Proposal refers to an external set of guidelines for implementing the Proposal but fails to adequately define those guidelines; and
- the supporting statement's description of the Proposal conflicts with the language in the Proposal.

## ANALYSIS

**The Proposal May Be Excluded Under Rule 14a-8(i)(3) Because The Proposal Is Impermissibly Vague And Indefinite So As To Be Inherently Misleading.**

Rule 14a-8(i)(3) permits the exclusion of a stockholder proposal if the proposal or supporting statement is contrary to any of the Commission's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. The Staff

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consistently has taken the position that vague and indefinite stockholder proposals are inherently misleading and therefore excludable under Rule 14a-8(i)(3) because “neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires.” Staff Legal Bulletin No. 14B (Sept. 15, 2004) (“SLB 14B”); *see also Dyer v. SEC*, 287 F.2d 773, 781 (8th Cir. 1961) (“[I]t appears to us that the proposal, as drafted and submitted to the company, is so vague and indefinite as to make it impossible for either the board of directors or the stockholders at large to comprehend precisely what the proposal would entail.”).

A. *The Proposal Is Excludable Because It Relies On An External Set Of Guidelines But Fails To Sufficiently Describe The Substantive Provisions Of The Guidelines.*

The Staff has permitted the exclusion of stockholder proposals that—just like the Proposal—impose a standard by reference to a particular set of guidelines when the proposal or supporting statement failed sufficiently to describe the substantive provisions of the external guidelines. *See, e.g., Exxon Mobil Corp. (Naylor)* (avail. Mar. 21, 2011) (concurring with the exclusion of a proposal requesting the use of, but failing to sufficiently explain, “guidelines from the Global Reporting Initiative”); *AT&T Inc.* (Feb. 16, 2010) (concurring with the exclusion of a proposal that sought a report on, among other things, “grassroots lobbying communications as defined in 26 C.F.R. § 56.4911-2”); *Johnson & Johnson* (avail. Feb. 7, 2003) (concurring with the exclusion of a proposal requesting the adoption of the “Glass Ceiling Commission’s” business recommendations without describing the recommendations).

In *Boeing Co.* (avail. Feb. 10, 2004), the stockholder proposal requested a bylaw requiring the chairman of the company’s board of directors to be an independent director, “according to the 2003 Council of Institutional Investors definition.” The company argued that the proposal referenced a standard for independence but failed to adequately describe or define that standard such that stockholders would be unable to make an informed decision on the merits of the proposal. The Staff concurred with the exclusion of the proposal under Rule 14a-8(i)(3) as vague and indefinite because it “fail[ed] to disclose to shareholders the definition of ‘independent director’ that it [sought] to have included in the bylaws.” *See also PG&E Corp.* (avail. Mar. 7, 2008); *Schering-Plough Corporation* (avail. Mar. 7, 2008); *JPMorgan Chase & Co.* (avail. Mar. 5, 2008) (all concurring in the exclusion of proposals that requested that the company require the board of directors to appoint an independent lead director as defined by the standard of independence “set by the Council of Institutional Investors,” without providing an explanation of what that particular standard entailed).

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The Proposal, which states that the chairman of the board of directors must be an independent director “by the standard of the New York Stock Exchange,” is substantially similar to the proposal in *Boeing* and the precedent cited above. The Proposal relies upon an external standard of independence (the New York Stock Exchange standard) in order to implement a central aspect of the Proposal but fails to describe the substantive provisions of the standard. Without information on the specifics of the New York Stock Exchange’s listing standards, stockholders will be unable to determine the standard of independence to be applied under the Proposal that they are being asked to vote upon. As the Staff has found on numerous occasions, the Company’s stockholders cannot be expected to make an informed decision on the merits of the Proposal without at least knowing what they are voting on. See SLB 14B (noting that “neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires”). Further, the Company’s guidelines for director independence, which it discloses on its website pursuant to Item 407(a)(2) of Regulation S-K, are in some instances more stringent than the requirements imposed by the New York Stock Exchange. Thus, the proxy statement will not contain a description of the New York Stock Exchange independence standard. Accordingly, stockholders voting on the Proposal will have no guidance from the Proposal itself or from the proxy statement as to the definition of independence to be applied under the Proposal. As a result, stockholders will not have the necessary information from which to make an informed decision on the specific requirements the Proposal would impose.

The Proposal is distinguishable from other stockholder proposals that refer to director independence that the Staff did not concur were vague and indefinite. In these cases, the reference to the external source was not a prominent feature of the proposal. For example, in *Allegheny Energy, Inc.* (avail. Feb. 12, 2010) the Staff did not concur with the exclusion of a proposal under Rule 14a-8(i)(3) where the proposal requested that the chairman be an independent director (by the standard of the New York Stock Exchange) who had not previously served as an executive officer of the company. Although the proposal referenced the independent director standard of the New York Stock Exchange, the supporting statement in the *Allegheny Energy* proposal focused extensively on the chairman being an individual who was not concurrently serving, and had not previously served, as the chief executive officer, such that the additional requirement that the chairman be independent was not the primary thrust of the proposal. Unlike the proposal in *Allegheny Energy*, the Proposal and supporting statement here do not shift the emphasis of the Proposal away from the New York Stock Exchange standard of director independence and onto an alternate test of independence (a person who is not and was not formerly the chief executive officer). In this respect, the Proposal is similar to the proposal in *Boeing*, which included analogous language by speaking favorably of “separating the roles of Chairman and CEO,” and yet which the Staff

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concluded was impermissibly vague through its reliance on an external standard of independence that was not described in the proposal. Consistent with *Boeing*, we believe the Proposal's reference to the New York Stock Exchange standard of independence is a central element of the Proposal that is not defined or explained and that the Proposal's statements about separating the roles of chairman and chief executive officer do not alter that fact.

Further, we acknowledge that the Staff denied no-action relief under Rule 14a-8(i)(3) for some proposals with similar references to third party independence standards. *See AT&T Inc.* (avail. Jan. 30, 2009); *Clear Channel Communications, Inc.* (avail. Feb. 15, 2006); *Kohl's Corp.* (avail. Mar. 10, 2003). However, although the Staff did not explain the reasoning for its decisions, it appears that the no-action requests submitted in those instances did not directly and adequately argue that the proposals were vague and indefinite by virtue of their referencing an external standard without adequately describing the standard. For example, in *Clear Channel Communications*, the company argued that the external standard referenced was not a definition but a "confused 'discussion,'" and the proposal in *Clear Channel Communications*, unlike the Proposal, also set forth an additional definition of independence.

Because the New York Stock Exchange standard of independence is central to the Proposal, one cannot truly understand the Proposal without information on the New York Stock Exchange standard. Accordingly, we believe that the Proposal's failure to adequately describe the substantive provisions of the New York Stock Exchange standard of independence will render stockholders who are voting on the proposal unable to determine with any reasonable certainty what actions or measures the proposal requires. As a result, and consistent with the precedent discussed above, we believe the Proposal is so vague and indefinite as to be excludable in its entirety under Rule 14a-8(i)(3).

*B. The Proposal Is Excludable Because The Supporting Statement Explains The Proposal As Operating In A Manner That Is Inconsistent With The Language Of The Proposal.*

The Staff has on numerous occasions concluded that a stockholder proposal was sufficiently misleading so as to justify exclusion where a company and its stockholders might interpret the proposal differently, such that "any action ultimately taken by the [c]ompany upon implementation [of the proposal] could be significantly different from the actions envisioned by shareholders voting on the proposal." *Fuqua Industries, Inc.* (avail. Mar. 12, 1991). For example, in *General Motors Corp.* (avail. Apr. 2, 2008), the Staff concluded with excluding a proposal under Rule 14a-8(i)(3) because vague timing references in the proposal could result in action that was "significantly different" than what stockholders voting on the proposal

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might have expected. In *General Motors*, the proposal asked that executive pensions be adjusted pursuant to a “leveling formula” based on changes compared to “an average baseline executive employment level during the six year period immediately preceding commencement of GM’s restructuring initiatives.” The company argued that stockholders would not know what six year period was contemplated under the proposal, in light of the company having undertaken several “restructuring initiatives,” and the Staff concurred that the proposal could be excluded because it was vague and indefinite. *See also Verizon Communications Inc.* (avail. Feb. 21, 2008) (excluding under Rule 14a-8(i)(3) a proposal attempting to set formulas for short- and long-term incentive-based executive compensation where the company argued that because the methods of calculation were inconsistent with each other, it could not determine with any certainty how to implement the proposal).

Consistent with the express language of Rule 14a-8(i)(3), which refers to both the proposal and supporting statement, the Staff has concurred that companies can exclude proposals where the supporting statement contains material misstatements as to the effect of implementing the proposal. For example, in *The Ryland Group, Inc.* (avail. Feb. 7, 2008), the Staff concurred that a proposal could be excluded under Rule 14a-8(i)(3) where the resolved clause sought an advisory vote both on “the executive compensation policies and practices set forth in the Company’s Compensation Discussion and Analysis” and on the board Compensation Committee Report, yet the supporting statement stated that the effect of the proposal would be to provide a way to advise the company’s board on “whether the company’s policies and decisions on compensation have been adequately explained.” Thus, the proposal and supporting statement, when read together, provided two significantly different expectations of what implementation of the proposal would entail. *See also Jefferies Group, Inc.* (avail. Feb. 11, 2008, *recon. denied* Feb. 25, 2008) (concurring in the exclusion of a similar proposal where the supporting statement resulted in vague and misleading statements as to the effect of implementing the proposal).

The Staff has previously concurred that a proposal and supporting statement may be excluded under Rule 14a-8(i)(3) based on vague or misleading statements as to the timing of the action sought under the proposal. Specifically, in *SunTrust Banks, Inc.* (avail. Dec. 31, 2008), a stockholder proposal requested that the board and its compensation committee implement certain executive compensation reforms if the company chose to participate in the Troubled Asset Relief Program (“TARP”). The proposal itself was silent as to the duration of the reforms but correspondence from the proponent indicated that the proponent’s intent was that the reforms were to be in effect for the duration of the company’s participation in TARP. The Staff concurred that the proposal was excludable under Rule 14a-8(i)(3), noting that:

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There appears to be some basis for your view that SunTrust may exclude the proposal under rule 14a-8(i)(3) as vague and indefinite. In arriving at this position, we note the proponent's statement that the "intent of the Proposal is that the executive compensation reforms urged in the Proposal remain in effect so long as the company participates in the TARP." By its terms, however, the proposal appears to impose no limitation on the duration of the specified reforms.

The Proposal is vague and inherently misleading because the supporting statement explains the Proposal as operating in a manner that is inconsistent with the language of the Proposal. Specifically, the Proposal requests that the "board of directors adopt a policy that, *whenever possible*, the chairman of our board shall be an independent director..." (emphasis added). Reading this language, a stockholder would expect that implementation of the Proposal would entail the Company's board adopting a policy and naming an independent director to serve as chairman of the board as soon as possible. The only time that a stockholder would expect this policy not to apply would be if it were at a particular time not possible to identify an independent director who would agree to serve as chair.<sup>1</sup> Stockholders would not expect from this language that implementation of the Proposal could entail adopting a policy that did not become effective until some indefinite date, which could be a number of years in the future.<sup>2</sup>

However, the supporting statement states that "this proposal gives the option of being phased in and implemented when our next CEO is chosen." This assertion that the Proposal has the

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<sup>1</sup> The Proposal does state that it may be implemented in a way that would not violate any existing contractual obligations, but stockholders would not expect that provision to be applicable as the Company consistently has not disclosed executive employment agreements in the Compensation Discussion & Analysis section of its proxy statement, as would otherwise be required pursuant to Item 402(e)(1)(i) of Regulation S-K. This type of delayed implementation is only an elaboration on the language of the Proposal stating that the board chair should be independent "whenever possible," and thus is significantly different than the delayed implementation described in the supporting statement.

<sup>2</sup> The age of the Company's Chief Executive Officer is 57. Based on the language of the Proposal, we would not expect the Staff to concur that a company had substantially implemented the Proposal under Rule 14a-8(i)(10) if the Company's board adopted a policy that did not become effective until an indefinite date in the future that could be years away.

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“option of being phased in” is not reflected anywhere in the text of the resolved clause and directly conflicts with the statement that the Proposal is to be implemented “whenever possible.” Thus, a stockholder reading the Proposal and the supporting statement would not know whether the policy it is being asked to vote on would go into effect immediately and require that the current chairman be replaced by an independent director, or not go into effect until some indefinite date in the future, after the current chairman ceases to serve as chief executive officer. Likewise the Company’s board, in seeking to implement the policy, would not know whether stockholders intended for it to apply immediately, as indicated by the Proposal, or only in the future, as stated in the supporting statement.

The Proposal and supporting statement are comparable to the situation considered by the Staff in the *SunTrust Banks* precedent discussed above. By its terms, the proposal there did not appear to have any limitation on the timing of the reform that stockholders were being asked to approve. Nevertheless, statements by the proponent of that proposal indicated that it did intend there to be some limitation on the timing of implementing the reforms addressed in the proposal. If the company had implemented the proposed reforms only during the period that it was subject to TARP, its actions would have been significantly different than what stockholders reading the language of the proposal had expected. The same facts exist here. The language of the Proposal does not have any applicable limitation on the timing of implementing the reform under the policy that stockholders are being asked to support; in fact, the resolved clause of the Proposal states that the policy calling for an independent board chairman should be implemented “whenever possible,” which suggests that the board must have an independent chairman as soon as practicable. The Proposal gives no explicit option of delay and in fact requests immediate implementation, as it would be “possible” for the board to require that the chairman be an independent director as soon as the policy is approved. By contrast, the supporting statement asserts that the policy described in the Proposal need not be implemented as soon as possible, but can be delayed to a date that, depending on the term of the current chief executive officer, could be years in the future. Thus, if the Company’s board, in reliance on the supporting statement, were to implement the proposed reform under the Proposal so that it applied only when the next chief executive officer is chosen, its actions would be significantly different than what stockholders reading the language of the Proposal would have expected. Likewise, if the Company were to implement the language of the Proposal and immediately name an independent chairman of the board, its action would be significantly different than what stockholders who relied on the explanation in the supporting statement would have expected.

As in *Ryland Group* and *Jeffries Group*, the Proposal and its supporting statement have significantly differing descriptions of the effect of implementing the Proposal. Given the misleading assertion in the supporting statement and the resulting potentially divergent

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interpretations of when the Proposal must be implemented, it is not possible for a stockholder in voting on the Proposal to determine exactly what the Proposal is seeking. A stockholder relying on the supporting statement could incorrectly believe that the Proposal has an explicit option for phasing in its implementation when no such option actually exists by the Proposal's own terms. Further, the conflicting language of the Proposal and the supporting statement creates a fundamental uncertainty as to whether the board must immediately implement a policy requiring an independent chairman or whether the policy can be adopted now but not implemented until a much later date. As a result, stockholders voting on the Proposal might each interpret it differently, such that any action the Company ultimately takes to implement the Proposal could be significantly different from the actions stockholders envisioned when voting on the Proposal. *See Fuqua Industries, Inc.* (avail. Mar. 12, 1991); *see also Prudential Financial, Inc.* (avail. Feb. 16, 2007) (concurring with the exclusion of a proposal, which was susceptible to a different interpretation if read literally than if read in conjunction with the supporting statement, as vague and indefinite); *International Business Machines Corp.* (avail. Feb. 2, 2005) (concurring with the exclusion of a proposal regarding executive compensation as vague and indefinite because the identity of the affected executives was susceptible to multiple interpretations).

Consistent with Staff precedent, the Company's stockholders cannot be expected to make an informed decision on the merits of the Proposal if they are unable "to determine with any reasonable certainty exactly what actions or measures the proposal requires." SLB 14B; *see also Boeing Co.* (avail. Feb. 10, 2004); *Capital One Financial Corp.* (avail. Feb. 7, 2003) (concurring in the exclusion of a proposal under Rule 14a-8(i)(3) where the company argued that its stockholders "would not know with any certainty what they are voting either for or against"). Accordingly, we believe that as a result of the vague and indefinite nature of the Proposal, the Proposal is impermissibly misleading and, thus, excludable in its entirety under Rule 14a-8(i)(3).

## CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its 2012 Proxy Materials pursuant to Rule 14a-8(i)(3).

# GIBSON DUNN

Office of Chief Counsel  
Division of Corporation Finance  
December 21, 2011  
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We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to [shareholderproposals@gibsondunn.com](mailto:shareholderproposals@gibsondunn.com). If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8671 or Amy E. Wilson, in the Company's Office of the Corporate Secretary, at (989) 638-2176.

Sincerely,



Ronald O. Mueller

Enclosures

cc: Amy E. Wilson, The Dow Chemical Company  
W. Michael McGuire, The Dow Chemical Company  
Kenneth Steiner  
John Chevedden

101202766.3

GIBSON DUNN

**EXHIBIT A**

Kenneth Steiner

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

Mr. Andrew N. Liveris  
Chairman of the Board  
The Dow Chemical Company (DOW)  
2030 Dow Ctr  
Midland MI 48674  
Phone: 989 636-1000

Dear Mr. Liveris,

I submit my attached Rule 14a-8 proposal in support of the long-term performance of our company. My proposal is for the next annual shareholder meeting. I will meet Rule 14a-8 requirements including the continuous ownership of the required stock value until after the date of the respective shareholder meeting. My submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication. This is my proxy for John Chevedden and/or his designee to forward this Rule 14a-8 proposal to the company and to act on my behalf regarding this Rule 14a-8 proposal, and/or modification of it, for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting. Please direct all future communications regarding my rule 14a-8 proposal to John Chevedden  
(PH: \_\_\_\_\_ ) at:

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

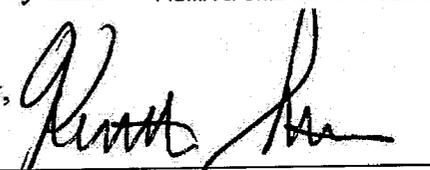
to facilitate prompt and verifiable communications. Please identify this proposal as my proposal exclusively.

This letter does not cover proposals that are not rule 14a-8 proposals. This letter does not grant the power to vote.

Your consideration and the consideration of the Board of Directors is appreciated in support of the long-term performance of our company. Please acknowledge receipt of my proposal promptly by email to \_\_\_\_\_

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

Sincerely,

  
Kenneth Steiner

11-4-11  
Date

cc: Charles J. Kalil  
Corporate Secretary  
Amy E. Wilson <aewilson@dow.com>  
W. Michael McGuire <wmmcguire@dow.com>  
FX: 989-638-1740

[DOW: Rule 14a-8 Proposal, November 24, 2011]

**3\* – Independent Board Chairman**

RESOLVED: Shareholders request that our board of directors adopt a policy that, whenever possible, the chairman of our board of directors shall be an independent director (by the standard of the New York Stock Exchange), who has not previously served as an executive officer of our Company. This policy should be implemented so as not to violate any contractual obligations in effect when this resolution is adopted. The policy should also specify how to select a new independent chairman if a current chairman ceases to be independent between annual shareholder meetings.

To foster flexibility, this proposal gives the option of being phased in and implemented when our next CEO is chosen.

When a CEO serves as our board chairman, this arrangement can hinder our board's ability to monitor our CEO's performance. Many companies already have an independent Chairman. An independent Chairman is the prevailing practice in the United Kingdom and many international markets. This proposal topic won 50%-plus support at four major U.S. companies in 2011. James McRitchie and William Steiner have sponsored proposals on this topic which received significant votes.

The merit of this Independent Board Chairman proposal should also be considered in the context of the opportunity for additional improvement in our company's 2011 reported corporate governance in order to more fully realize our company's potential:

The Corporate Library, an independent investment research firm, rated our company "Very High Concern" in executive pay – \$21 million for our CEO Andrew Liveris. Plus Mr. Liveris was also potentially entitled to \$20 million if there is a change in control.

Executive long-term incentive pay consisted of performance shares and time-based equity pay in the form of deferred stock and market-priced stock options. Equity pay given for long-term incentives should include performance-vesting features. Moreover, the performance shares covered a three-year period and more than 50% of the pay was given even if our company underperformed half of industry peers in terms of relative Total Shareholder Return.

In addition, our CEO had \$3.6 million of pension increases and non-qualified deferred pay plus \$297,000 of "all other compensation," including \$134,000 for his personal use of company aircraft and \$53,000 for his financial planning. Because such pay was not directly tied to his performance, it is difficult to justify in terms of shareholder benefit. Executive pay policies such as these are not aligned with shareholder interests.

An independent Chairman policy can improve investor confidence in our Company and strengthen the integrity of our Board. Please encourage our board to respond positively to this proposal for an Independent Board Chairman – Yes on 3.\*

Notes:

Kenneth Steiner,

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

sponsored this proposal.

Please note that the title of the proposal is part of the proposal.

\*Number to be assigned by the company.

This proposal is believed to conform with Staff Legal Bulletin No. 14B (CF), September 15, 2004 including (emphasis added):

Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on rule 14a-8(l)(3) in the following circumstances:

- the company objects to factual assertions because they are not supported;
- the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
- the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or
- the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.

***We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.***

See also: Sun Microsystems, Inc. (July 21, 2005).

Stock will be held until after the annual meeting and the proposal will be presented at the annual meeting. Please acknowledge this proposal promptly by email |

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



2030 Dow Center  
November 29, 2011

The Dow Chemical Company  
Midland, Michigan 48674  
USA

*Via Overnight Mail*

John Chevedden

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

### **Stockholder Proposal on Independent Board Chairman**

Dear Mr. Chevedden:

By way of this letter, I wish to acknowledge timely receipt on November 24, 2011 of a stockholder proposal on independent board chairman that you submitted for the 2012 Annual Meeting of Stockholders of The Dow Chemical Company. The cover letter accompanying the proposal indicates that communications regarding the proposal should be directed to your attention.

Mr. Steiner's letter indicates that he is the owner of Dow stock valued at over \$2,000, and intends to continue ownership of at least \$2,000 in market value of these shares through the date of the 2012 Annual Meeting.

Rule 14a-8(b) under the Securities Exchange Act of 1934, as amended, provides that each shareholder proponent must submit sufficient proof that it has continuously held at least \$2,000 in market value, or 1%, of a company's shares entitled to vote on the proposal for at least one year as of the date the shareholder proposal was submitted. To date, we have not received such proof of ownership.

To remedy this defect, Kenneth Steiner must submit sufficient proof of its ownership of the requisite number of Company shares. As explained in Rule 14a-8(b), sufficient proof may be in the form of:

- a written statement from the "record" holder of Kenneth Steiner's shares (usually a broker or a bank) verifying that, as of the date the proposal was submitted, Kenneth Steiner continuously held the requisite number of Company shares for at least one year; or
- if Kenneth Steiner has filed with the Securities and Exchange Commission ("SEC") a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5, or amendments to those documents or updated forms, reflecting his ownership of Company shares as of or before the date on which the one-year eligibility period begins, a copy of the schedule and/or form, and any subsequent amendments reporting a change in the ownership level and a written statement that Kenneth Steiner continuously held the required number of shares for the one-year period.

If Kenneth Steiner intends to demonstrate ownership by submitting a written statement from the "record" holder of his shares, please note that most large U.S. brokers and banks deposit their customers' securities with, and hold those securities through, the DTC, a registered clearing agency that acts as a securities depository (DTC is also known through the account name of Cede & Co.). Under SEC Staff Legal Bulletin No. 14F, only DTC participants are viewed as record holders of securities that are deposited at DTC. Kenneth Steiner can confirm whether his broker or bank is a DTC participant by asking his broker or bank or by checking DTC's participant list, which is available at <http://www.dtcc.com/downloads/membership/directories/dtc/alpha.pdf>. In these situations, shareowners need to obtain proof of ownership from the DTC participant through which the securities are held, as follows:

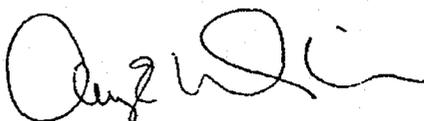
- If Kenneth Steiner's broker or bank is a DTC participant, then Kenneth Steiner needs to submit a written statement from its broker or bank verifying that, as of the date the Proposal was submitted, Kenneth Steiner continuously held the requisite number of Company shares for at least one year.
- If Kenneth Steiner's broker or bank is not a DTC participant, then Kenneth Steiner needs to submit proof of ownership from the DTC participant through which the shares are held verifying that, as of the date the Proposal was submitted, Kenneth Steiner continuously held the requisite number of Company shares for at least one year. Kenneth Steiner should be able to find out the identity of the DTC participant by asking his broker or bank. If Kenneth Steiner's broker is an introducing broker, Kenneth Steiner may also be able to learn the identity and telephone number of the DTC participant through his account statements, because the clearing broker identified on his account statements will generally be a DTC participant. If the DTC participant that holds Kenneth Steiner's shares is not able to confirm Kenneth Steiner's individual holdings but is able to confirm the holdings of Kenneth Steiner's broker or bank, then Kenneth Steiner needs to satisfy the proof of ownership requirements by obtaining and submitting two proof of ownership statements verifying that, as of the date the Proposal was submitted, the requisite number of Company shares were continuously held for at least one year: (i) one from Kenneth Steiner's broker or bank confirming Kenneth Steiner's ownership, and (ii) the other from the DTC participant confirming the broker or bank's ownership.

The rules of the SEC require that any response to this letter be postmarked or transmitted electronically no later than 14 calendar days from the date this letter is received. For your reference, please find enclosed a copy of Rule 14a-8 and Staff Legal Bulletin No. 14F.

Mr. Chevedden  
11/29/11

For your reference, please note that Dow's Annual Meeting will be held on May 10, 2012 in Midland, Michigan.

Sincerely,



Amy E. Wilson  
Assistant Secretary  
989-638-2176  
Fax: 989-638-1740  
aewilson@dow.com

cc: Kenneth Steiner, via Overnight Mail

## Rule 14a-8 -- Proposals of Security Holders

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This section addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders. In summary, in order to have your shareholder proposal included on a company's proxy card, and included along with any supporting statement in its proxy statement, you must be eligible and follow certain procedures. Under a few specific circumstances, the company is permitted to exclude your proposal, but only after submitting its reasons to the Commission. We structured this section in a question-and-answer format so that it is easier to understand. The references to "you" are to a shareholder seeking to submit the proposal.

- a. **Question 1: What is a proposal?** A shareholder proposal is your recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders. Your proposal should state as clearly as possible the course of action that you believe the company should follow. If your proposal is placed on the company's proxy card, the company must also provide in the form of proxy means for shareholders to specify by boxes a choice between approval or disapproval, or abstention. Unless otherwise indicated, the word "proposal" as used in this section refers both to your proposal, and to your corresponding statement in support of your proposal (if any).
- b. **Question 2: Who is eligible to submit a proposal, and how do I demonstrate to the company that I am eligible?**
  1. In order to be eligible to submit a proposal, you must have continuously held at least \$2,000 in market value, or 1% of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal. You must continue to hold those securities through the date of the meeting.
  2. If you are the registered holder of your securities, which means that your name appears in the company's records as a shareholder, the company can verify your eligibility on its own, although you will still have to provide the company with a written statement that you intend to continue to hold the securities through the date of the meeting of shareholders. However, if like many shareholders you are not a registered holder, the company likely does not know that you are a shareholder, or how many shares you own. In this case, at the time you submit your proposal, you must prove your eligibility to the company in one of two ways:
    - i. The first way is to submit to the company a written statement from the "record" holder of your securities (usually a broker or bank) verifying that, at the time you submitted your proposal, you continuously held the securities for at least one year. You must also include your own written statement that you intend to continue to hold the securities through the date of the meeting of shareholders, or
    - ii. The second way to prove ownership applies only if you have filed a Schedule 13D, Schedule 13G, Form 3, Form 4 and/or Form 5, or amendments to those documents or updated forms, reflecting your ownership of the shares as of or before the date on which the one-year eligibility period begins. If you have filed one of these documents with the SEC, you may demonstrate your eligibility by submitting to the company:

- A. A copy of the schedule and/or form, and any subsequent amendments reporting a change in your ownership level;
  - B. Your written statement that you continuously held the required number of shares for the one-year period as of the date of the statement; and
  - C. Your written statement that you intend to continue ownership of the shares through the date of the company's annual or special meeting.
- c. Question 3: How many proposals may I submit? Each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting.
- d. Question 4: How long can my proposal be? The proposal, including any accompanying supporting statement, may not exceed 500 words.
- e. Question 5: What is the deadline for submitting a proposal?
- 1. If you are submitting your proposal for the company's annual meeting, you can in most cases find the deadline in last year's proxy statement. However, if the company did not hold an annual meeting last year, or has changed the date of its meeting for this year more than 30 days from last year's meeting, you can usually find the deadline in one of the company's quarterly reports on Form 10-Q or 10-QSB, or in shareholder reports of investment companies under Rule 30d-1 of the Investment Company Act of 1940. [Editor's note: This section was redesignated as Rule 30e-1. See 66 FR 3734, 3759, Jan. 16, 2001.] In order to avoid controversy, shareholders should submit their proposals by means, including electronic means, that permit them to prove the date of delivery.
  - 2. The deadline is calculated in the following manner if the proposal is submitted for a regularly scheduled annual meeting. The proposal must be received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting. However, if the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the deadline is a reasonable time before the company begins to print and send its proxy materials.
  - 3. If you are submitting your proposal for a meeting of shareholders other than a regularly scheduled annual meeting, the deadline is a reasonable time before the company begins to print and send its proxy materials.
- f. Question 6: What if I fail to follow one of the eligibility or procedural requirements explained in answers to Questions 1 through 4 of this section?
- 1. The company may exclude your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it. Within 14 calendar days of receiving your proposal, the company must notify you in writing of any procedural or eligibility deficiencies, as well as of the time frame for your response. Your response must be postmarked, or transmitted electronically, no later than 14 days from the date you received the company's notification. A company need not provide you such notice of a deficiency if the deficiency cannot be remedied,

such as if you fail to submit a proposal by the company's properly determined deadline. If the company intends to exclude the proposal, it will later have to make a submission under Rule 14a-9 and provide you with a copy under Question 10 below, Rule 14a-8(j).

2. If you fail in your promise to hold the required number of securities through the date of the meeting of shareholders, then the company will be permitted to exclude all of your proposals from its proxy materials for any meeting held in the following two calendar years.
- g. Question 7: Who has the burden of persuading the Commission or its staff that my proposal can be excluded? Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal.
- h. Question 8: Must I appear personally at the shareholders' meeting to present the proposal?
1. Either you, or your representative who is qualified under state law to present the proposal on your behalf, must attend the meeting to present the proposal. Whether you attend the meeting yourself or send a qualified representative to the meeting in your place, you should make sure that you, or your representative, follow the proper state law procedures for attending the meeting and/or presenting your proposal.
  2. If the company holds its shareholder meeting in whole or in part via electronic media, and the company permits you or your representative to present your proposal via such media, then you may appear through electronic media rather than traveling to the meeting to appear in person.
  3. If you or your qualified representative fail to appear and present the proposal, without good cause, the company will be permitted to exclude all of your proposals from its proxy materials for any meetings held in the following two calendar years.
- i. Question 9: If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal?
1. Improper under state law: if the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization;

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**Note to paragraph (i)(1)**

Depending 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. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.

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2. **Violation of law:** If the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject:

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**Note to paragraph (1)(2)**

Note to paragraph (1)(2): We will not apply this basis for exclusion to permit exclusion of a proposal on grounds that it would violate foreign law if compliance with the foreign law could result in a violation of any state or federal law.

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3. **Violation of proxy rules:** If the proposal or supporting statement is contrary to any of the Commission's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials;
4. **Personal grievance; special interest:** If the proposal relates to the redress of a personal claim or grievance against the company or any other person, or if it is designed to result in a benefit to you, or to further a personal interest, which is not shared by the other shareholders at large;
5. **Relevance:** If the proposal relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business;
6. **Absence of power/authority:** If the company would lack the power or authority to implement the proposal;
7. **Management functions:** If the proposal deals with a matter relating to the company's ordinary business operations;
8. **Relates to election:** If the proposal
- i. Would disqualify a nominee who is standing for election;
  - ii. Would remove a director from office before his or her term expired;
  - iii. Questions the competence, business judgment, or character of one or more nominees or directors;
  - iv. Seeks to include a specific individual in the company's proxy materials for election to the board of directors; or
  - v. Otherwise could affect the outcome of the upcoming election of directors.
9. **Conflicts with company's proposal:** If the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting.
-

**Note to paragraph (i)(9)**

Note to paragraph (i)(9): A company's submission to the Commission under this section should specify the points of conflict with the company's proposal.

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10. **Substantially implemented:** If the company has already substantially implemented the proposal;
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**Note to paragraph (i)(10)**

Note to paragraph (i)(10): A company may exclude a shareholder proposal that would provide an advisory vote or seek future advisory votes to approve the compensation of executives as disclosed pursuant to Item 402 of Regulation S-K (§229.402 of this chapter) or any successor to Item 402 (a "say-on-pay vote") or that relates to the frequency of say-on-pay votes, provided that in the most recent shareholder vote required by §240.14a-21(b) of this chapter a single year (i.e., one, two, or three years) received approval of a majority of votes cast on the matter and the company has adopted a policy on the frequency of say-on-pay votes that is consistent with the choice of the majority of votes cast in the most recent shareholder vote required by §240.14a-21(b) of this chapter.

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11. **Duplication:** If the proposal substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting;
12. **Resubmissions:** If the proposal deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding 5 calendar years, a company may exclude it from its proxy materials for any meeting held within 3 calendar years of the last time it was included if the proposal received:
- i. Less than 3% of the vote if proposed once within the preceding 5 calendar years;
  - ii. Less than 6% of the vote on its last submission to shareholders if proposed twice previously within the preceding 5 calendar years; or
  - iii. Less than 10% of the vote on its last submission to shareholders if proposed three times or more previously within the preceding 5 calendar years; and
13. **Specific amount of dividends:** If the proposal relates to specific amounts of cash or stock dividends.
- j. **Question 10:** What procedures must the company follow if it intends to exclude my proposal?

1. If the company intends to exclude a proposal from its proxy materials, it must file its reasons with the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The company must simultaneously provide you with a copy of its submission. The Commission staff may permit the company to make its submission later than 80 days before the company files its definitive proxy statement and form of proxy, if the company demonstrates good cause for missing the deadline.

2. The company must file six paper copies of the following:

i. The proposal;

ii. An explanation of why the company believes that it may exclude the proposal, which should, if possible, refer to the most recent applicable authority, such as prior Division letters issued under the rule; and

iii. A supporting opinion of counsel when such reasons are based on matters of state or foreign law.

k. Question 11: May I submit my own statement to the Commission responding to the company's arguments?

Yes, you may submit a response, but it is not required. You should try to submit any response to us, with a copy to the company, as soon as possible after the company makes its submission. This way, the Commission staff will have time to consider fully your submission before it issues its response. You should submit six paper copies of your response.

l. Question 12: If the company includes my shareholder proposal in its proxy materials, what information about me must it include along with the proposal itself?

1. The company's proxy statement must include your name and address, as well as the number of the company's voting securities that you hold. However, instead of providing that information, the company may instead include a statement that it will provide the information to shareholders promptly upon receiving an oral or written request.

2. The company is not responsible for the contents of your proposal or supporting statement.

m. Question 13: What can I do if the company includes in its proxy statement reasons why it believes shareholders should not vote in favor of my proposal, and I disagree with some of its statements?

1. The company may elect to include in its proxy statement reasons why it believes shareholders should vote against your proposal. The company is allowed to make arguments reflecting its own point of view, just as you may express your own point of view in your proposal's supporting statement.

2. However, if you believe that the company's opposition to your proposal contains materially false or misleading statements that may violate our anti-fraud rule, Rule 14a-9, you should promptly send to the Commission staff and the company a letter explaining the reasons for your view, along with a copy of the company's statements opposing your proposal. To the extent possible, your letter should include specific factual information demonstrating

the inaccuracy of the company's claims. Time permitting, you may wish to try to work out your differences with the company by yourself before contacting the Commission staff.

3. We require the company to send you a copy of its statements opposing your proposal before it sends its proxy materials, so that you may bring to our attention any materially false or misleading statements, under the following timeframes:
  - i. If our no-action response requires that you make revisions to your proposal or supporting statement as a condition to requiring the company to include it in its proxy materials, then the company must provide you with a copy of its opposition statements no later than 5 calendar days after the company receives a copy of your revised proposal; or
  - ii. In all other cases, the company must provide you with a copy of its opposition statements no later than 30 calendar days before it files definitive copies of its proxy statement and form of proxy under Rule 14a-6.



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U.S. Securities and Exchange Commission

**Division of Corporation Finance  
Securities and Exchange Commission**

**Shareholder Proposals**

**Staff Legal Bulletin No. 14F (CF)**

**Action:** Publication of CF Staff Legal Bulletin

**Date:** October 18, 2011

**Summary:** This staff legal bulletin provides information for companies and shareholders regarding Rule 14a-8 under the Securities Exchange Act of 1934.

**Supplementary Information:** The statements in this bulletin represent the views of the Division of Corporation Finance (the "Division"). This bulletin is not a rule, regulation or statement of the Securities and Exchange Commission (the "Commission"). Further, the Commission has neither approved nor disapproved its content.

**Contacts:** For further information, please contact the Division's Office of Chief Counsel by calling (202) 551-3500 or by submitting a web-based request form at [https://tts.sec.gov/cgi-bin/corp\\_fin\\_interpretive](https://tts.sec.gov/cgi-bin/corp_fin_interpretive).

**A. The purpose of this bulletin**

This bulletin is part of a continuing effort by the Division to provide guidance on important issues arising under Exchange Act Rule 14a-8. Specifically, this bulletin contains information regarding:

- Brokers and banks that constitute "record" holders under Rule 14a-8 (b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8;
- Common errors shareholders can avoid when submitting proof of ownership to companies;
- The submission of revised proposals;
- Procedures for withdrawing no-action requests regarding proposals submitted by multiple proponents; and
- The Division's new process for transmitting Rule 14a-8 no-action responses by email.

You can find additional guidance regarding Rule 14a-8 in the following

bulletins that are available on the Commission's website: SLB No. 14, SLB No. 14A, SLB No. 14B, SLB No. 14C, SLB No. 14D and SLB No. 14E.

**B. The types of brokers and banks that constitute "record" holders under Rule 14a-8(b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8**

**1. Eligibility to submit a proposal under Rule 14a-8**

To be eligible to submit a shareholder proposal, a shareholder must have continuously held at least \$2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the shareholder meeting for at least one year as of the date the shareholder submits the proposal. The shareholder must also continue to hold the required amount of securities through the date of the meeting and must provide the company with a written statement of intent to do so.<sup>1</sup>

The steps that a shareholder must take to verify his or her eligibility to submit a proposal depend on how the shareholder owns the securities. There are two types of security holders in the U.S.: registered owners and beneficial owners.<sup>2</sup> Registered owners have a direct relationship with the issuer because their ownership of shares is listed on the records maintained by the issuer or its transfer agent. If a shareholder is a registered owner, the company can independently confirm that the shareholder's holdings satisfy Rule 14a-8(b)'s eligibility requirement.

The vast majority of investors in shares issued by U.S. companies, however, are beneficial owners, which means that they hold their securities in book-entry form through a securities intermediary, such as a broker or a bank. Beneficial owners are sometimes referred to as "street name" holders. Rule 14a-8(b)(2)(i) provides that a beneficial owner can provide proof of ownership to support his or her eligibility to submit a proposal by submitting a written statement "from the 'record' holder of [the] securities (usually a broker or bank)," verifying that, at the time the proposal was submitted, the shareholder held the required amount of securities continuously for at least one year.<sup>3</sup>

**2. The role of the Depository Trust Company**

Most large U.S. brokers and banks deposit their customers' securities with, and hold those securities through, the Depository Trust Company ("DTC"), a registered clearing agency acting as a securities depository. Such brokers and banks are often referred to as "participants" in DTC.<sup>4</sup> The names of these DTC participants, however, do not appear as the registered owners of the securities deposited with DTC on the list of shareholders maintained by the company or, more typically, by its transfer agent. Rather, DTC's nominee, Cede & Co., appears on the shareholder list as the sole registered owner of securities deposited with DTC by the DTC participants. A company can request from DTC a "securities position listing" as of a specified date, which identifies the DTC participants having a position in the company's securities and the number of securities held by each DTC participant on that date.<sup>5</sup>

**3. Brokers and banks that constitute "record" holders under Rule**

**14a-8(b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8**

In *The Hain Celestial Group, Inc.* (Oct. 1, 2008), we took the position that an introducing broker could be considered a "record" holder for purposes of Rule 14a-8(b)(2)(i). An introducing broker is a broker that engages in sales and other activities involving customer contact, such as opening customer accounts and accepting customer orders, but is not permitted to maintain custody of customer funds and securities.<sup>5</sup> Instead, an introducing broker engages another broker, known as a "clearing broker," to hold custody of client funds and securities, to clear and execute customer trades, and to handle other functions such as issuing confirmations of customer trades and customer account statements. Clearing brokers generally are DTC participants; introducing brokers generally are not. As introducing brokers generally are not DTC participants, and therefore typically do not appear on DTC's securities position listing, *Hain Celestial* has required companies to accept proof of ownership letters from brokers in cases where, unlike the positions of registered owners and brokers and banks that are DTC participants, the company is unable to verify the positions against its own or its transfer agent's records or against DTC's securities position listing.

In light of questions we have received following two recent court cases relating to proof of ownership under Rule 14a-8<sup>7</sup> and in light of the Commission's discussion of registered and beneficial owners in the Proxy Mechanics Concept Release, we have reconsidered our views as to what types of brokers and banks should be considered "record" holders under Rule 14a-8(b)(2)(i). Because of the transparency of DTC participants' positions in a company's securities, we will take the view going forward that, for Rule 14a-8(b)(2)(i) purposes, only DTC participants should be viewed as "record" holders of securities that are deposited at DTC. As a result, we will no longer follow *Hain Celestial*.

We believe that taking this approach as to who constitutes a "record" holder for purposes of Rule 14a-8(b)(2)(i) will provide greater certainty to beneficial owners and companies. We also note that this approach is consistent with Exchange Act Rule 12g5-1 and a 1988 staff no-action letter addressing that rule,<sup>8</sup> under which brokers and banks that are DTC participants are considered to be the record holders of securities on deposit with DTC when calculating the number of record holders for purposes of Sections 12(g) and 15(d) of the Exchange Act.

Companies have occasionally expressed the view that, because DTC's nominee, Cede & Co., appears on the shareholder list as the sole registered owner of securities deposited with DTC by the DTC participants, only DTC or Cede & Co. should be viewed as the "record" holder of the securities held on deposit at DTC for purposes of Rule 14a-8(b)(2)(i). We have never interpreted the rule to require a shareholder to obtain a proof of ownership letter from DTC or Cede & Co., and nothing in this guidance should be construed as changing that view.

*How can a shareholder determine whether his or her broker or bank is a DTC participant?*

Shareholders and companies can confirm whether a particular broker or bank is a DTC participant by checking DTC's participant list, which is currently available on the Internet at <http://www.dtcc.com/downloads/membership/directories/dtc/alpha.pdf>.

*What if a shareholder's broker or bank is not on DTC's participant list?*

The shareholder will need to obtain proof of ownership from the DTC participant through which the securities are held. The shareholder should be able to find out who this DTC participant is by asking the shareholder's broker or bank.<sup>2</sup>

If the DTC participant knows the shareholder's broker or bank's holdings, but does not know the shareholder's holdings, a shareholder could satisfy Rule 14a-8(b)(2)(i) by obtaining and submitting two proof of ownership statements verifying that, at the time the proposal was submitted, the required amount of securities were continuously held for at least one year – one from the shareholder's broker or bank confirming the shareholder's ownership, and the other from the DTC participant confirming the broker or bank's ownership.

*How will the staff process no-action requests that argue for exclusion on the basis that the shareholder's proof of ownership is not from a DTC participant?*

The staff will grant no-action relief to a company on the basis that the shareholder's proof of ownership is not from a DTC participant only if the company's notice of defect describes the required proof of ownership in a manner that is consistent with the guidance contained in this bulletin. Under Rule 14a-8(f)(1), the shareholder will have an opportunity to obtain the requisite proof of ownership after receiving the notice of defect.

### **C. Common errors shareholders can avoid when submitting proof of ownership to companies**

In this section, we describe two common errors shareholders make when submitting proof of ownership for purposes of Rule 14a-8(b)(2), and we provide guidance on how to avoid these errors.

First, Rule 14a-8(b) requires a shareholder to provide proof of ownership that he or she has "continuously held at least \$2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal" (emphasis added).<sup>10</sup> We note that many proof of ownership letters do not satisfy this requirement because they do not verify the shareholder's beneficial ownership for the entire one-year period preceding and including the date the proposal is submitted. In some cases, the letter speaks as of a date *before* the date the proposal is submitted, thereby leaving a gap between the date of the verification and the date the proposal is submitted. In other cases, the letter speaks as of a date *after* the date the proposal was submitted but covers a period of only one year, thus failing to verify the shareholder's beneficial ownership over the required full

one-year period preceding the date of the proposal's submission.

Second, many letters fail to confirm continuous ownership of the securities. This can occur when a broker or bank submits a letter that confirms the shareholder's beneficial ownership only as of a specified date but omits any reference to continuous ownership for a one-year period.

We recognize that the requirements of Rule 14a-8(b) are highly prescriptive and can cause inconvenience for shareholders when submitting proposals. Although our administration of Rule 14a-8(b) is constrained by the terms of the rule, we believe that shareholders can avoid the two errors highlighted above by arranging to have their broker or bank provide the required verification of ownership as of the date they plan to submit the proposal using the following format:

"As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least one year, [number of securities] shares of [company name] [class of securities]."<sup>11</sup>

As discussed above, a shareholder may also need to provide a separate written statement from the DTC participant through which the shareholder's securities are held if the shareholder's broker or bank is not a DTC participant.

#### **D. The submission of revised proposals**

On occasion, a shareholder will revise a proposal after submitting it to a company. This section addresses questions we have received regarding revisions to a proposal or supporting statement.

##### **1. A shareholder submits a timely proposal. The shareholder then submits a revised proposal before the company's deadline for receiving proposals. Must the company accept the revisions?**

Yes. In this situation, we believe the revised proposal serves as a replacement of the initial proposal. By submitting a revised proposal, the shareholder has effectively withdrawn the initial proposal. Therefore, the shareholder is not in violation of the one-proposal limitation in Rule 14a-8(c).<sup>12</sup> If the company intends to submit a no-action request, it must do so with respect to the revised proposal.

We recognize that in Question and Answer E.2 of SLB No. 14, we indicated that if a shareholder makes revisions to a proposal before the company submits its no-action request, the company can choose whether to accept the revisions. However, this guidance has led some companies to believe that, in cases where shareholders attempt to make changes to an initial proposal, the company is free to ignore such revisions even if the revised proposal is submitted before the company's deadline for receiving shareholder proposals. We are revising our guidance on this issue to make clear that a company may not ignore a revised proposal in this situation.<sup>13</sup>

##### **2. A shareholder submits a timely proposal. After the deadline for receiving proposals, the shareholder submits a revised proposal. Must the company accept the revisions?**

No. If a shareholder submits revisions to a proposal after the deadline for receiving proposals under Rule 14a-8(e), the company is not required to accept the revisions. However, if the company does not accept the revisions, it must treat the revised proposal as a second proposal and submit a notice stating its intention to exclude the revised proposal, as required by Rule 14a-8(j). The company's notice may cite Rule 14a-8(e) as the reason for excluding the revised proposal. If the company does not accept the revisions and intends to exclude the initial proposal, it would also need to submit its reasons for excluding the initial proposal.

**3. If a shareholder submits a revised proposal, as of which date must the shareholder prove his or her share ownership?**

A shareholder must prove ownership as of the date the original proposal is submitted. When the Commission has discussed revisions to proposals,<sup>14</sup> it has not suggested that a revision triggers a requirement to provide proof of ownership a second time. As outlined in Rule 14a-8(b), proving ownership includes providing a written statement that the shareholder intends to continue to hold the securities through the date of the shareholder meeting. Rule 14a-8(f)(2) provides that if the shareholder "falls in [his or her] promise to hold the required number of securities through the date of the meeting of shareholders, then the company will be permitted to exclude all of [the same shareholder's] proposals from its proxy materials for any meeting held in the following two calendar years." With these provisions in mind, we do not interpret Rule 14a-8 as requiring additional proof of ownership when a shareholder submits a revised proposal.<sup>15</sup>

**E. Procedures for withdrawing no-action requests for proposals submitted by multiple proponents**

We have previously addressed the requirements for withdrawing a Rule 14a-8 no-action request in SLB Nos. 14 and 14C. SLB No. 14 notes that a company should include with a withdrawal letter documentation demonstrating that a shareholder has withdrawn the proposal. In cases where a proposal submitted by multiple shareholders is withdrawn, SLB No. 14C states that, if each shareholder has designated a lead individual to act on its behalf and the company is able to demonstrate that the individual is authorized to act on behalf of all of the proponents, the company need only provide a letter from that lead individual indicating that the lead individual is withdrawing the proposal on behalf of all of the proponents.

Because there is no relief granted by the staff in cases where a no-action request is withdrawn following the withdrawal of the related proposal, we recognize that the threshold for withdrawing a no-action request need not be overly burdensome. Going forward, we will process a withdrawal request if the company provides a letter from the lead filer that includes a representation that the lead filer is authorized to withdraw the proposal on behalf of each proponent identified in the company's no-action request.<sup>16</sup>

**F. Use of email to transmit our Rule 14a-8 no-action responses to companies and proponents**

To date, the Division has transmitted copies of our Rule 14a-8 no-action responses, including copies of the correspondence we have received in connection with such requests, by U.S. mail to companies and proponents.

We also post our response and the related correspondence to the Commission's website shortly after issuance of our response.

In order to accelerate delivery of staff responses to companies and proponents, and to reduce our copying and postage costs, going forward, we intend to transmit our Rule 14a-8 no-action responses by email to companies and proponents. We therefore encourage both companies and proponents to include email contact information in any correspondence to each other and to us. We will use U.S. mail to transmit our no-action response to any company or proponent for which we do not have email contact information.

Given the availability of our responses and the related correspondence on the Commission's website and the requirement under Rule 14a-8 for companies and proponents to copy each other on correspondence submitted to the Commission, we believe it is unnecessary to transmit copies of the related correspondence along with our no-action response. Therefore, we intend to transmit only our staff response and not the correspondence we receive from the parties. We will continue to post to the Commission's website copies of this correspondence at the same time that we post our staff no-action response.

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<sup>1</sup> See Rule 14a-8(b).

<sup>2</sup> For an explanation of the types of share ownership in the U.S., see Concept Release on U.S. Proxy System, Release No. 34-62495 (July 14, 2010) [75 FR 42982] ("Proxy Mechanics Concept Release"), at Section II.A. The term "beneficial owner" does not have a uniform meaning under the federal securities laws. It has a different meaning in this bulletin as compared to "beneficial owner" and "beneficial ownership" in Sections 13 and 16 of the Exchange Act. Our use of the term in this bulletin is not intended to suggest that registered owners are not beneficial owners for purposes of those Exchange Act provisions. See Proposed Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34-12598 (July 7, 1976) [41 FR 29982], at n.2 ("The term 'beneficial owner' when used in the context of the proxy rules, and in light of the purposes of those rules, may be interpreted to have a broader meaning than it would for certain other purpose[s] under the federal securities laws, such as reporting pursuant to the Williams Act.").

<sup>3</sup> If a shareholder has filed a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5 reflecting ownership of the required amount of shares, the shareholder may instead prove ownership by submitting a copy of such filings and providing the additional information that is described in Rule 14a-8(b)(2)(ii).

<sup>4</sup> DTC holds the deposited securities in "fungible bulk," meaning that there are no specifically identifiable shares directly owned by the DTC participants. Rather, each DTC participant holds a pro rata interest or position in the aggregate number of shares of a particular issuer held at DTC. Correspondingly, each customer of a DTC participant – such as an individual investor – owns a pro rata interest in the shares in which the DTC

participant has a pro rata interest. See Proxy Mechanics Concept Release, at Section II.B.2.a.

<sup>5</sup> See Exchange Act Rule 17Ad-8.

<sup>6</sup> See Net Capital Rule, Release No. 34-31511 (Nov. 24, 1992) [57 FR 56973] ("Net Capital Rule Release"), at Section II.C.

<sup>7</sup> See *KBR Inc. v. Chevedden*, Civil Action No. H-11-0196, 2011 U.S. Dist. LEXIS 36431, 2011 WL 1463611 (S.D. Tex. Apr. 4, 2011); *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723 (S.D. Tex. 2010). In both cases, the court concluded that a securities intermediary was not a record holder for purposes of Rule 14a-8(b) because it did not appear on a list of the company's non-objecting beneficial owners or on any DTC securities position listing, nor was the intermediary a DTC participant.

<sup>8</sup> *Techne Corp.* (Sept. 20, 1988).

<sup>9</sup> In addition, if the shareholder's broker is an introducing broker, the shareholder's account statements should include the clearing broker's identity and telephone number. See Net Capital Rule Release, at Section II.C.(iii). The clearing broker will generally be a DTC participant.

<sup>10</sup> For purposes of Rule 14a-8(b), the submission date of a proposal will generally precede the company's receipt date of the proposal, absent the use of electronic or other means of same-day delivery.

<sup>11</sup> This format is acceptable for purposes of Rule 14a-8(b), but it is not mandatory or exclusive.

<sup>12</sup> As such, it is not appropriate for a company to send a notice of defect for multiple proposals under Rule 14a-8(c) upon receiving a revised proposal.

<sup>13</sup> This position will apply to all proposals submitted after an initial proposal but before the company's deadline for receiving proposals, regardless of whether they are explicitly labeled as "revisions" to an initial proposal, unless the shareholder affirmatively indicates an intent to submit a second, *additional* proposal for inclusion in the company's proxy materials. In that case, the company must send the shareholder a notice of defect pursuant to Rule 14a-8(f)(1) if it intends to exclude either proposal from its proxy materials in reliance on Rule 14a-8(c). In light of this guidance, with respect to proposals or revisions received before a company's deadline for submission, we will no longer follow *Layne Christensen Co.* (Mar. 21, 2011) and other prior staff no-action letters in which we took the view that a proposal would violate the Rule 14a-8(c) one-proposal limitation if such proposal is submitted to a company after the company has either submitted a Rule 14a-8 no-action request to exclude an earlier proposal submitted by the same proponent or notified the proponent that the earlier proposal was excludable under the rule.

<sup>14</sup> See, e.g., Adoption of Amendments Relating to Proposals by Security Holders, Release No. 34-12999 (Nov. 22, 1976) [41 FR 52994].

<sup>15</sup> Because the relevant date for proving ownership under Rule 14a-8(b) is the date the proposal is submitted, a proponent who does not adequately prove ownership in connection with a proposal is not permitted to submit another proposal for the same meeting on a later date.

<sup>16</sup> Nothing in this staff position has any effect on the status of any shareholder proposal that is not withdrawn by the proponent or its authorized representative.

<http://www.sec.gov/interps/legal/cfslb14f.htm>

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Modified: 10/18/2011



December 5, 2011

Kenneth Steiner

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

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Co./Dept.		Co.			
Phone #		Phone			
Fax #	989-638-1740	Fax #			

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

Re: TD Ameritrade account ending in [redacted] OMB Memorandum M-07-16 \*\*\*

Dear Kenneth Steiner,

Thank you for allowing me to assist you today. Pursuant to your request, this letter is to confirm that you have continuously held no less than 1,500 shares of the security American Express (AXP), 3,100 shares of McGraw – Hill (MHP), 2,790 shares of Verizon Communications Inc. (VZ), and 1,200 shares of DOW Chemical (DOW) in the TD Ameritrade Clearing, Inc., DTC # 0188, account ending in [redacted] since November 03, 2010.

If you have any further questions, please contact 800-669-3900 to speak with a TD Ameritrade Client Services representative, or e-mail us at clientservices@tdameritrade.com. We are available 24 hours a day, seven days a week.

Sincerely,

Nathan Stark  
Research Specialist  
TD Ameritrade

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