

NO ACT

16
1-20-15



DIVISION OF
CORPORATION FINANCE

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



February 16, 2015

Received SEC

Elizabeth A. Ising
Gibson, Dunn & Crutcher LLP
shareholderproposals@gibsondunn.com

FEB 16 2015

Washington, DC 20549

Act: 1934
Section: _____
Rule: 14a-8 (ODS)
Public _____
Availability: 2-16-15

Re: The Southern Company
Incoming letter dated January 20, 2015

Dear Ms. Ising:

This is in response to your letter dated January 20, 2015 concerning the shareholder proposal submitted to Southern by the New York City Employees' Retirement System, the New York City Fire Department Pension Fund, the New York City Teachers' Retirement System, the New York City Police Pension Fund and the New York City Board of Education Retirement System. We also have received a letter on the proponents' behalf dated February 6, 2015. 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,

Matt S. McNair
Special Counsel

Enclosure

cc: Richard S. Simon
The City of New York
Office of the Comptroller
rsimon@comptroller.nyc.gov

February 16, 2015

Response of the Office of Chief Counsel
Division of Corporation Finance

Re: The Southern Company
Incoming letter dated January 20, 2015

The proposal relates to director nominations.

We are unable to concur in your view that Southern may exclude the proposal under rules 14a-8(b) and 14a-8(f). Accordingly, we do not believe that Southern may omit the proposal from its proxy materials in reliance on rules 14a-8(b) and 14a-8(f).

Sincerely,

Luna Bloom
Attorney-Advisor

**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 matter 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 shareholders 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.



THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
1 CENTRE STREET, ROOM 602
NEW YORK, N.Y. 10007-2341

SCOTT M. STRINGER
COMPTROLLER

Richard S. Simon
Deputy General Counsel

Email:
rsimon@comptroller.nyc.gov
Telephone: 212-669-4568

BY EMAIL

February 6, 2015

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

**Re: The Southern Company;
Shareholder Proposal submitted by the New York City Retirement Systems**

To Whom It May Concern:

I write on behalf of the New York City Retirement Systems (the "Systems"), in response to the January 20, 2015 no-action request (the "Company Letter") sent by outside counsel for The Southern Company ("Southern" or the "Company"). Southern contends that the Systems' proxy access proposal (the "Proposal") may be omitted from the Company's 2015 proxy materials, and seeks confirmation from the Staff of the Division of Corporation Finance (the "Staff") that enforcement action will not be recommended if the Company omits the Proposal.

The Company wrongly seeks to exclude the Proposal from its 2015 proxy materials pursuant to Rule 14a-8(b) and Rule 14a-8(f)(1), on the basis of the Company's unsupported and incorrect hypothesis that because the Systems' initial bank custodian, Bank of New York Mellon, submitted proof of ownership letters for the period from October 20, 2013 through October 31, 2013, and the Systems' successor bank custodian, State Street, submitted proof of ownership letters for the period from November 1, 2013 through October 28, 2014, the Systems must have sold and repurchased their Southern shares between October 31 and November 1, 2013, thereby creating an alleged "2013 Ownership Gap" between those two successive days (Company Letter at pp. 2-3).

Southern's no-action request should be denied for the same reasons that the Staff recently denied the effectively identical request of The AES Corporation. *AES Corp.* (Jan. 20, 2015). The bank custodians' letters adequately showed that the Systems owned the required Southern stock continuously, with no gap, for at least one year, and the Company never had any basis in fact for asserting otherwise. Moreover, the Company's Deficiency Notice failed to disclose Southern's "Ownership Gap" theory in any way that a proponent could understand and respond to. In light of that, and based upon my review of the Proposal, the Company Letter, and Rule 14a-8, it is my opinion that the Proposal may not be omitted from the Company's 2015 proxy materials. The Systems respectfully request that the Staff deny Southern's request for "no-action" advice.

I. Discussion

The Company has not met its burden of showing under Rule 14a-8(b) and Rule 14a-8(f)(1) that the Systems did not continuously own at least \$2,000 of Southern stock for at least one year prior to the submission of the Proposal. In summary:

- The proof of ownership letters from the Systems' custodian banks always showed continuous ownership for the required period, with no gap;
- There was never any basis for Southern to claim that notwithstanding those facially adequate letters, the Systems' multiple outside investment managers might have sold all of their collective holdings of over one million Southern shares and repurchased them the next day; and
- The Company's Deficiency Notices never gave any indication that notwithstanding the Systems' facially adequate ownership letters, the Company was asking for proof that the Systems' holdings had not all been sold one day and bought back the next.

A. The Systems' Proof of Ownership Letters Showed Continuous Ownership

That Southern cannot meet its burden is clear from the face of the bank custodians' letters (Exhibits A and D to the Company Letter), which evidence the Systems' continuous ownership of well over one million Southern shares throughout the requisite one-year period, without any gap between the dates covered in the combination of the initial and successor bank custodians' letters. As one would expect in the case of successor bank custodians for an institutional investor, the initial bank custodian's letters cover the period through the last day it served as the Systems' custodian, and the successor custodian's letters cover the period beginning on the very next day. In any such succession between two bank custodians, the ownership letters would follow that logical pattern, and would be wholly proper under the Rules 14a-8(b) and (f).

With no facts to the contrary, Southern can do no more than venture the vague and unsupported guess that because there were two successive bank custodians, and they reported different shareholdings for the different periods covered in their respective letters, "it appears that the Proponents may have sold their shares and repurchased them on the following day. . ." (Company Letter at p. 2). The Company's guess is particularly inapt in light of the fact that for public pension funds such as the Systems, multiple outside investment managers make the investment decisions, and bank custodians do not. Southern's claim that such total mass divestiture "is not an uncommon process when investors are changing custodians and rebalancing their portfolio holdings" (Company Letter at p. 6) would have required that all of the multiple independent managers for each of the NYC Systems decide to sell all of their one-million-plus Southern shares (and presumably all shares of all of the Systems' equity holdings) on the same day, and buy them back the next. That, however, did not happen, and Southern has no basis for claiming that "it appears" it "may have."

Indeed, Southern's "gap" theory -- that at the change of bank custodians, the Systems'

managers sold all of the Systems' equity holdings on October 31, 2013, and repurchased those holdings on November 1, 2013 -- is also belied by the publicly-available data as to stock trading on the exchanges. On October 31, 2013, the Systems owned over \$62 billion in U.S. equities (page available by click-throughs from <http://comptroller.nyc.gov/general-information/pension-funds-asset-allocation/>). At an average price for NYSE-listed stocks of about \$35-40 per share (see http://www.nyxdata.com/nysedata/asp/factbook/viewer_edition.asp?mode=tables&key=320&category=3), the Systems' U.S. equity holdings represented in excess of 1.5 billion shares. Even if one-third of the Systems' U.S. equity holdings were of NASDAQ-listed stocks, the Systems' holdings of NYSE-listed stocks would have been about 1 billion shares. As shown on the compilation below of NYSE daily trading data from the Bloomberg online reporting system, both on October 31 and November 1, 2013, and in the week before and the week after those dates, the average consolidated daily trading volume of NYSE-listed stocks, on all exchanges, was only about 3 billion shares:

Date	Volume	Date	Volume
10/24/2013	2.91B	11/1/2013	2.95B
10/25/2013	2.57B	11/4/2013	2.58B
10/28/2013	2.71B	11/5/2013	2.84B
10/29/2013	2.74B	11/6/2013	2.72B
10/30/2013	2.86B	11/7/2013	3.44B
10/31/2013	3.08B		

There was no spike in NYSE daily volume, as the one-day divestiture and then repurchase of all or most of a billion NYSE shares would inevitably have caused. Southern's Gap hypothesis never had any basis in reality, and cannot be used to contradict wholly adequate ownership letters from the leading bank custodians, that fully covered the one-year period with no gap whatsoever.

B. There Was No Basis in Fact for a Claim that the Systems Sold All of their Shares

While logic, public data and industry practice alone always sufficed to show the absence of any reasonable basis for Southern's guesses, that lack of any basis is confirmed in the attached email (spreadsheets omitted) dated January 29, 2015 from Derek Farrell of State Street, the Systems' successor custodian. The email begins by noting that "In response to your query regarding the Ownership Letters reflecting minimum positions for THE SOUTHERN CO (Cusip 842587107), please note that assets were transferred from the prior trustee (BNY Mellon) to State Street on November 1, 2013." The State Street email further explains, using the example of the Teachers' Retirement System, that while "Our opening position of 818,913 shares equaled BNY Mellon's minimum share position," thereafter, "For the remainder of the period in question, total share position steadily decreased, to our minimum share position of 749,770 shares. This would suggest to me that investment managers were reducing their position prior to conversion from BNY Mellon to SSB, and continued to do so after the conversion." It is further apparent that State Street's letters report the "minimum positions," *i.e.*, the lowest shareholdings during the period covered by the letters. These points, and the other points noted in State Street's email, fully account for the different shareholding numbers compared to BNY Mellon's letters. Given that, as noted above, multiple independent outside managers make the investment decisions for each of the Systems, the email merely confirms the obvious: the size of shareholdings would fluctuate over a year-long period, but that large holdings would still be maintained continuously.

Southern's unsupported and incorrect speculation cannot serve as the basis for no-action advice under Rules 14a-8(b) and 14a-8(f)(1). *See, e.g., AES Corp.* (Dec. 16, 2014) (denying no-action advice under Rules 14a-8(b) and 14a-8(f) where the Company speculated that since broker's October 22, 2014 letter affirmed that proponent "has continuously owned" the required AES shares "since October 11, 2013 [in excess of twelve months]," but did not specifically state that proponent owned the shares "as of the date of this letter," the omission of the Company's preferred phrasing might mean that proponent no longer held the shares as of the date of the broker's letter). We note further that in none of the no-action letters cited anywhere in the Company Letter (at pp. 5-9, *passim*) did the Staff issue no-action advice where, as here, one custodian supplied ownership letters up through one date in the one-year period, and a successor custodian then supplied ownership letters beginning the very next day, through the rest of the one-year period.

C. The Company's Deficiency Notice Gave No Hint of its Share Sale Claim

Moreover, *Staff Legal Bulletin No. 14G* (Oct. 16, 2012) makes clear that the Company's failure to state clearly that alleged deficiency in its November 7, 2014 Deficiency Notice to the Systems (Exhibit B to the Company Letter) precludes Southern from now raising that unsupported speculation. That Notice stated only that "In addition, the Bank Letters are insufficient because they report on the Proponents' ownership of the Company's stock through October 31, 2013 and commencing on November 1, 2013 rather than verifying *continuous ownership* by the Proponents for the entire one-year period" (emphasis in original). That language gave no clue that Southern's unspoken and unexpected complaint was that even though, between them, the bank custodians' letters attested to the Systems' holdings of over one million Southern shares during the entire one-year period with no gap, the letters failed to attest to a negative: that the investment managers for the Systems had not sold all of the Systems' Southern stock on October 31, 2013 and bought it back on November 1, 2013. The Company's failure violated the guidance of *Staff Legal Bulletin 14G* that:

We are concerned that companies' notices of defect are not adequately describing the defects or explaining what a proponent must do to remedy defects in proof of ownership letters. For example, some companies' notices of defect make no mention of the gap in the period of ownership covered by the proponent's proof of ownership letter or other specific deficiencies that the company has identified. We do not believe that such notices of defect serve the purpose of Rule 14a-8(f).

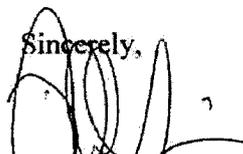
Had Southern stated in the Deficiency Notice its specific concern that all of the Systems' Southern shares might have been sold on October 31, 2013, the Systems could have readily addressed that concern in November 2014, just as they do today, and all parties would have been saved much effort.

For each of the above reasons, the Company's no-action request should be denied.

II. Conclusion

For the reasons set forth herein, the Systems respectfully submit that the Company's request for "no-action" relief under Rules 14a-8(b) and (f) should be denied. Should you have any questions or require any additional information, please do not hesitate to contact me at the number listed above. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard S. Simon". The signature is stylized with large, overlapping loops and a long horizontal stroke at the end.

Richard S. Simon

Cc: Elizabeth A. Ising, Esq.
Gibson, Dunn & Crutcher LLP
Eising@gibsondunn.com

From: Farrell, Derek [<mailto:DFarrell@StateStreet.com>]
Sent: Thursday, January 29, 2015 4:45 PM
To: Garland, Michael
Cc: Folder-Taylor, Michelle; NYCCClientService
Subject: Ownership Letters - THE SOUTHERN CO inquiry

Mr. Garland,

In response to your query regarding the Ownership Letters reflecting minimum positions for THE SOUTHERN CO (Cusip 842587107), please note that assets were transferred from the prior trustee (BNY Mellon) to State Street on November 1, 2013.

Specific to Teachers:

- Our opening position of 818,913 shares equaled BNY Mellon's minimum share position
- For the remainder of the period in question, total share position steadily decreased, to our minimum share position of 749,770 shares
- This would suggest to me that investment managers were reducing their position prior to conversion from BNY Mellon to SSB, and continued to do so after the conversion

Specific to NYCERS:

- Our opening position of 628,953 shares essentially equaled BNY Mellon's minimum share position of 628,175
- For the remainder of the period in question, total share position steadily decreased, to our minimum share position of 558,741 shares
- Again, this would suggest to me that investment managers were reducing their position prior to conversion from BNY Mellon to SSB, and continued to do so after the conversion

Please see supporting schedules attached – note there are three tabs comprising:

- Holdings reports as of 11/1/13 and also as of 10/24/13
- Transactions by trade date from 11/1/13 to 10/24/13
- Transactions by trade date from 10/24/14 to 11/14/14

Let us know if you require anything further? Thank you,

Derek

Derek A. Farrell | State Street Global Services | IIS | OSL / NYC | Phone: 617 784 6378 | Email: DFarrell@StateStreet.com

January 20, 2015

VIA E-MAIL

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

Re: *The Southern Company
Stockholder Proposal of the New York City Employees' Retirement System, the
New York City Fire Department Pension Fund, the New York City Teachers'
Retirement System, the New York City Police Pension Fund and the New York
City Board of Education Retirement System
Securities Exchange Act of 1934—Rule 14a-8*

Ladies and Gentlemen:

This letter is to inform you that our client, The Southern Company (the “Company”), intends to omit from its proxy statement and form of proxy for its 2015 Annual Meeting of Stockholders (collectively, the “2015 Proxy Materials”) a stockholder proposal (the “Proposal”) and statements in support thereof received from Michael Garland on behalf of the Comptroller of the City of New York, Scott M. Stringer, as custodian and trustee of the New York City Employees’ Retirement System, the New York City Fire Department Pension Fund, the New York City Teachers’ Retirement System and the New York City Police Pension Fund and as custodian of the New York City Board of Education Retirement System (collectively, the “Proponents”).

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 2015 Proxy Materials with the Commission; and
- concurrently sent copies of this correspondence to the Proponents.

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 Proponents that if the Proponents elect to submit additional correspondence to the Commission or the Staff with

GIBSON DUNN

Office of Chief Counsel
Division of Corporation Finance
January 20, 2015
Page 2

respect to this 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.

BASIS FOR EXCLUSION

We hereby respectfully request that the Staff concur in our view that the Proposal may be excluded from the 2015 Proxy Materials pursuant to Rule 14a-8(b) and Rule 14a-8(f)(1).

As further described below, the proof of ownership provided by the Proponents (both before and after the Company provided them a specific and timely deficiency notice) reflects an interruption in continuous ownership between October 31, 2013 and November 1, 2013 (the "2013 Ownership Gap"). Because no proof was provided explaining the 2013 Ownership Gap, the Company does not know the reason for the 2013 Ownership Gap. On its face, it appears that the Proponents may have sold their shares and repurchased them on the following day, which would disqualify them from being eligible to submit a proposal this year under Rule 14a-8. Even if there is some other explanation for the 2013 Ownership Gap, such as a transfer of stockholdings from one record holder to another by the Proponents, the Proponents did not, in response to our request, provide proof of ownership letters verifying that the end date of the first record holder's holding period matched the start date of the second record holder's holding period. The Proponents therefore did not satisfy the requirements of Rule 14a-8 to demonstrate that they maintained continuous ownership of the Company's stock for the full one-year period preceding and including the date they submitted the Proposal. In fact, in this case, the Proponents did not provide any proof of ownership addressing or explaining the 2013 Ownership Gap at all.

Regardless of the circumstances that resulted in the 2013 Ownership Gap, the Staff consistently has granted no-action relief where, in response to a proper notice, proponents have failed to furnish sufficient evidence of continuous stock ownership, even where the lack of evidence of continuous stock ownership related to a period as short as one day.

BACKGROUND

The Proponents submitted the Proposal to the Company via the United States Postal Service on October 28, 2014. The Company received the Proposal on October 29, 2014. The Proposal, as well as related correspondence from the Proponents, is attached hereto as Exhibit A.

The Company determined that the Proponents' submission did not satisfy the ownership requirements of Rule 14a-8(b), including because there was a one-day gap in continuous ownership from October 31, 2013 (the last date covered by the Bank of New York Mellon ("BNY") letters that were enclosed with the Proposal) to November 1, 2013 (the first date covered by the State Street Bank and Trust Company ("State Street") letters that were enclosed

GIBSON DUNN

Office of Chief Counsel
Division of Corporation Finance
January 20, 2015
Page 3

with the Proposal).¹ As the BNY and State Street letters enclosed with the Proposal did not reference a transfer, and the share amounts between the two record holders differ in the case of each of the Proponents (e.g., the letters verify that the New York City Employees' Retirement System owned 628,175 shares at BNY until October 31, 2013 but only 558,741 shares at State Street for the period beginning on November 1, 2013), the Company determined that the letters enclosed with the Proposal are not clear as to whether: (i) each Proponent sold shares held at BNY on October 31, 2013 and then purchased new shares under its account at State Street on November 1, 2013, or (ii) there was a transfer of the Proponents' shares between BNY and State Street on either October 31, 2013 or November 1, 2013. Accordingly, on November 7, 2014, which was within 14 days of the date the Company received the Proposal, the Company sent the Proponents a letter notifying the Proponents of this procedural deficiency as required by Rule 14a-8(f) (the "Deficiency Notice," attached hereto as Exhibit B). The Deficiency Notice was delivered to the Proponents at 10:06 A.M. on November 10, 2014. See Exhibit C.

The Deficiency Notice first informed the Proponents of the 2013 Ownership Gap:

The letters dated October 27, 2014 from BNY Mellon and State Street Bank and Trust Company enclosed with the Proposal (the "Bank Letters") are insufficient because they verify ownership from October 27, 2013 through October 31, 2013 and from November 1, 2013 through October 27, 2014 rather than for the entire one-year period preceding and including October 28, 2014, the date the Proposal was submitted to the Company.

The Deficiency Notice next informed the Proponents of the requirements of Rule 14a-8, with a clear explanation of the 2013 Ownership Gap:

In addition, the Bank Letters are insufficient because they report on the Proponents' ownership of the Company's stock through October 31, 2013 and commencing on November 1, 2013 rather than verifying *continuous* ownership by the Proponents for the entire one-year period (emphasis in original).

The Deficiency Notice further explained how the Proponents could cure the 2013 Ownership Gap. Specifically, it: (i) requested that the Proponents provide to the Company documentation "verifying their continuous ownership of the requisite number of Company shares for the one-year period preceding and including October 28, 2014, the date the Proposal was submitted to the Company"; and (ii) stated that the Proponents' response must "be postmarked or

¹ In addition, the letters from State Street that were enclosed with the Proposal verified the Proponents' ownership through October 27, 2014 rather than through October 28, 2014, the date the Proposal was submitted to the Company (the "Submission Date Gap"). The Proponents subsequently corrected this deficiency.

GIBSON DUNN

Office of Chief Counsel
Division of Corporation Finance
January 20, 2015
Page 4

transmitted electronically no later than 14 calendar days from the date you receive this letter.” The Deficiency Notice included a copy of Rule 14a-8 and Staff Legal Bulletin No. 14F (Oct. 18, 2011) (“SLB 14F”). See Exhibit B.

In a response dated November 14, 2014 (the “Response”), the Proponents addressed other deficiencies but failed to address the 2013 Ownership Gap (*i.e.*, continuous ownership between October 31, 2013 and November 1, 2013) for any Proponent. The Response is attached hereto as Exhibit D. The 14-day deadline for responding to the Deficiency Notice expired on November 24, 2014, and the Company has not received any other correspondence addressing the Proponents’ lack of proof of continuous ownership.

ANALYSIS

The Proposal May Be Excluded Under Rule 14a-8(b) And Rule 14a-8(f)(1) Because The Proponents Failed To Establish The Requisite Eligibility To Submit The Proposal.

The Company may exclude the Proposal under Rule 14a-8(f)(1) because the Proponents failed to substantiate their eligibility to submit the Proposal under Rule 14a-8(b). Specifically, the Proponents failed to provide the information requested in the Deficiency Notice to cure the 2013 Ownership Gap and thus establish that the Proponents continuously held the requisite number of shares for the one-year period preceding and including the date the Proposal was submitted.

Rule 14a-8(f) provides that a company may exclude a stockholder proposal if the proponent fails to provide evidence of eligibility under Rule 14a-8, including the beneficial ownership requirements of Rule 14a-8(b), provided that the company timely notifies the proponent of the problem and the proponent fails to correct the deficiency within the required time. Staff Legal Bulletin No. 14G (Oct. 16, 2012) (“SLB 14G”) provides specific guidance on the manner in which companies should notify proponents of a failure to provide proof of ownership for the one-year period required under Rule 14a-8(b)(1). SLB 14G expresses “concern[] that companies’ notices of defect are not adequately describing the defects or explaining what a proponent must do to remedy defects in proof of ownership letters.” It then goes on to state that, going forward, the Staff:

will not concur in the exclusion of a proposal under Rules 14a-8(b) and 14a-8(f) on the basis that a proponent’s proof of ownership does not cover the one-year period preceding and including the date the proposal is submitted unless the company provides a notice of defect that identifies the specific date on which the proposal was submitted and explains that the proponent must obtain a new proof of ownership letter verifying continuous ownership of the requisite amount of securities for the one-year period preceding and including such date to cure the

GIBSON DUNN

Office of Chief Counsel
Division of Corporation Finance
January 20, 2015
Page 5

defect. We view the proposal's date of submission as the date the proposal is postmarked or transmitted electronically.

Rule 14a-8(b)(1) provides, in part, that "[i]n order to be eligible to submit a proposal, [a stockholder] 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 [the stockholder] submit[s] the proposal." Rule 14a-8(b)(2) makes clear that the burden is on the stockholder proponent to establish the proponent's eligibility to submit a proposal, providing that "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*" (emphasis added). In addition, Staff Legal Bulletin No. 14 (July 13, 2001) ("SLB 14") specifies that when the stockholder is not the registered holder, the stockholder "is responsible for proving his or her eligibility to submit a proposal to the company," which the stockholder may do by one of the two ways provided in Rule 14a-8(b)(2). *See* SLB 14, Section C.1.c. The following example in SLB 14 makes clear the need for precision in demonstrating continuous ownership pursuant to Rule 14a-8(b):

If a shareholder submits his or her proposal to the company on June 1, does a statement from the record holder verifying that the shareholder owned the securities continuously for one year as of May 30 of the same year demonstrate sufficiently continuous ownership of the securities as of the time he or she submitted the proposal?

No. A shareholder must submit proof from the record holder that the shareholder continuously owned the securities for a period of one year as of the time the shareholder submits the proposal.

SLB 14, Section C.1.c.3.

The Staff consistently has granted no-action relief where proponents have failed, following a timely and proper request by a registrant, to furnish sufficient evidence of continuous stock ownership for the full one-year period preceding and including the submission date of the proposal, even where the lack of evidence of continuous stock ownership related to a period as short as one day. For example, in *PepsiCo, Inc. (Albert)* (avail. Jan. 10, 2013), the proponent submitted the proposal on November 20, 2012, and included a broker letter that established ownership of the company's securities for one year as of November 19, 2012. The company sent a timely deficiency notice to the proponent, and the proponent did not respond to the deficiency notice. The company argued that the proposal could be excluded because the broker letter was

GIBSON DUNN

Office of Chief Counsel
Division of Corporation Finance
January 20, 2015
Page 6

insufficient to prove continuous share ownership for one year as of November 20, 2012, the date the proposal was submitted. The Staff concurred in the exclusion of the proposal under Rules 14a-8(f) and 14a-8(b). Similarly, in *General Electric Co. (Randall)* (avail. Dec. 16, 2009), the Staff concurred with the exclusion of a stockholder proposal pursuant to Rules 14a-8(f) and 14a-8(b) where the proponent's cover letter was dated October 27, 2009, the proposal was submitted on October 28, 2009 and the record holder's one-year verification was as of October 27, 2009. *See also Comcast Corp.* (avail. Mar. 26, 2012) (letter from broker stating ownership for one year as of November 23, 2011 was insufficient to prove continuous ownership for one year as of November 30, 2011, the date the proposal was submitted); *International Business Machines Corp.* (avail. Dec. 7, 2007) (letter from broker stating ownership as of October 15, 2007 was insufficient to prove continuous ownership for one year as of October 22, 2007, the date the proposal was submitted); *The Home Depot, Inc.* (avail. Feb. 5, 2007) (letter from broker stating ownership for one year as of November 7, 2005 to November 7, 2006 was insufficient to prove continuous ownership for one year as of October 19, 2006, the date the proposal was submitted); *Sempra Energy* (avail. Jan. 3, 2006) (letter from broker stating ownership from October 24, 2004 to October 24, 2005 was insufficient to prove continuous ownership for one year as of October 31, 2005, the date the proposal was submitted); *International Business Machines Corp.* (avail. Jan. 7, 2002) (letter from broker stating ownership on August 15, 2001 was insufficient to prove continuous ownership for one year as of October 30, 2001, the date the proposal was submitted).

Here, the record holder statements provided by the Proponents fail to verify that the Proponents satisfied the Rule 14a-8 ownership requirements by holding the Company's stock continuously for at least one year. Instead, the documents provided by the Proponents indicate that the Proponents could have sold their Company stock any time during the day on October 31, 2013 and then purchased Company stock on November 1, 2013, which is not an uncommon process when investors are changing custodians and rebalancing their portfolio holdings. Specifically, the October 27, 2014 letters from BNY that were enclosed with the Proposal stated that each Proponent held the Company's stock "through October 31, 2013." Because the word "through," when referring to a particular point in time in an ordered sequence, means "to and including,"²

² For example, the "through" entry on Merriam-Webster.com defines the word as "to and including" in the context of "Monday through Friday." *Through*, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/through> (last visited Jan. 9, 2015). *See also Through*, Dictionary.com, <http://dictionary.reference.com/browse/through?s=t> (last visited Jan. 9, 2015) (defining "through" as "to and including" in the context of "from 1900 through 1950"); *Through*, Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/through?searchDictCode=all (last visited Jan. 9, 2015) (defining "through" as "[u]p to and including (a particular point in an ordered sequence)" in the context of "they will be in town from March 24 through May 7").

GIBSON DUNN

Office of Chief Counsel
Division of Corporation Finance
January 20, 2015
Page 7

the BNY letters merely verify that the Proponents held the Company's stock prior to, and at some point on, October 31, 2013. The letters from State Street that were enclosed with the Proposal merely verify that at some point on November 1, 2013, one day later, each Proponent began holding Company stock at State Street, as the letters provide that the Proponents held the Company's stock "from November 1, 2013 through today." This was reiterated—without any clarification despite this gap being identified in the Deficiency Notice—in the November 14, 2014 letters from State Street enclosed with the Response, which stated that each Proponent held the Company's stock "from November 1, 2013 through today." Consistent with a sale of Company stock on October 31, 2013 and a subsequent purchase of Company stock on November 1, 2013, the State Street letters indicate that the number of shares of Company stock held by each of the Proponents varied from the number of shares that BNY reported as being owned. Specifically, the letters verify that (i) the New York City Employees' Retirement System owned 628,175 shares at BNY until October 31, 2013 but only 558,741 shares at State Street for the period beginning on November 1, 2013, (ii) the New York City Teachers' Retirement System owned 818,913 shares at BNY until October 31, 2013 but only 749,770 shares at State Street for the period beginning on November 1, 2013, (iii) the New York City Police Pension Fund owned 169,242 shares at BNY until October 31, 2013 but only 162,543 shares at State Street for the period beginning on November 1, 2013, (iv) the New York City Fire Department Pension Fund owned 46,786 shares at BNY until October 31, 2013 but only 39,786 shares at State Street for the period beginning on November 1, 2013, and (v) the New York City Board of Education Retirement System owned 54,276 shares at BNY until October 31, 2013 and 54,704 shares at State Street for the period beginning on November 1, 2013.

Even if the 2013 Ownership Gap relates to a change in record holders of the Proponents' shares rather than to a sale and purchase of Company stock by the Proponents, the Proponents failed to provide a response documenting that situation and thus failed to demonstrate their continuous ownership for the entire one-year period preceding and including the date the Proposal was submitted to the Company. On numerous occasions, when a proponent's shares were transferred during the applicable one-year period, the proponent has provided sufficient proof of continuous ownership for purposes of the Rule 14a-8(b) requirement by submitting letters from each record holder demonstrating that there was no interruption in the proponent's chain of ownership. For example, in *Associated Estates Realty Corp.* (avail. Mar. 17, 2014), the proponent submitted letters from its introducing broker and the two record holders that held the proponent's shares during the previous one-year period. The first record holder's letter confirmed that the proponent's account held the company's securities "until December 7, 2012 on which date the shares were transferred out," and the second record holder's letter confirmed that it "became the registered owner . . . on December 7, 2012 (the 'Transfer Date') when the Shares were transferred . . . at the behest of our customer [the proponent] as a broker to broker transfer between accounts . . ." Similarly, in *Bank of America Corp.* (avail. Feb. 29, 2012), the

GIBSON DUNN

Office of Chief Counsel
Division of Corporation Finance
January 20, 2015
Page 8

proponent provided proof of ownership of the company's shares by submitting letters from TD Ameritrade, Inc. and Charles Schwab & Co. The TD Ameritrade letter confirmed ownership of the company's shares "from December 03, 2009 to April 21, 2011," and the Charles Schwab letter confirmed that the company's shares "have been held in this account continuously since April 21, 2011." See also *Moody's Corp.* (avail. Jan. 29, 2008) (the proponent's continuous ownership of the company's stock was verified by two letters, with the first letter stating that "[a]ll securities were transferred from Morgan Stanley on November 8, 2007" and the second letter stating that the proponent transferred the company's securities into his account on November 8, 2007); *Eastman Kodak Co.* (avail. Feb. 19, 2002) (the proponent provided letters from Merrill Lynch & Co., Inc. and Salomon Smith Barney Inc. to demonstrate his continuous ownership, with the Merrill Lynch letter stating that the proponent's shares were "transferred to Salomon Smith Barney Inc. on 09-28-2001" and the Salomon Smith Barney letter confirming that the shares were "transferred over from Merrill Lynch on 09/28/01"); *Comshare, Inc.* (avail. Sept. 5, 2001) (the proponent initially provided proof of ownership of the company's stock from March 30, 2000 until March 26, 2001, and the company sent a deficiency notice to the proponent requesting proof of the proponent's continuous ownership for the full one-year period "including the period from March 26, 2001 through the date the shareholder proposal was submitted," to which the proponent responded by providing two broker letters, with one letter stating that the proponent owned at least \$2,000 of the company's stock "from March 30, 2000 until March 26, 2001 when the account was transferred to Charles Schwab," and the second letter stating that the proponent has held the shares "continuously at Charles Schwab & Co., Inc. since March 26, 2001 to present").

In each of the foregoing examples, the proponent provided proof of ownership letters verifying that the end date of the first record holder's holding period matched the start date of the second record holder's holding period, showing that the proponent maintained continuous ownership despite the change in record holders. However, in this instance, the Proponents failed, following a timely and proper request by the Company, to furnish evidence of continuous ownership of Company stock for the full one-year period preceding and including the date the Proposal was submitted (*i.e.*, October 28, 2013 to October 28, 2014). Unlike the proponents in *Associated Estates Realty Corp.*, *Bank of America Corp.*, *Moody's Corp.*, *Eastman Kodak Co.* and *Comshare, Inc.*, the Proponents submitted proof of ownership letters where the end date for BNY's holding period (*i.e.*, October 31, 2013) did not match the start date of State Street's holding period (*i.e.*, November 1, 2013) and did not document a mere transfer of their shares. As discussed above, because of the 2013 Ownership Gap, the Proponents have failed to verify that they held the Company's stock continuously, as the Proponents could have sold some or all of their Company stock on October 31, 2013 and then purchased Company stock on November 1, 2013. Rule 14a-8(b)(2) and SLB 14 make clear that a stockholder carries the burden of establishing his or her eligibility to submit a proposal, and as demonstrated by the example in

GIBSON DUNN

Office of Chief Counsel
Division of Corporation Finance
January 20, 2015
Page 9

Section C.1.c.3 of SLB 14 and the precedents cited above, a stockholder must be precise in demonstrating such eligibility. And, as shown in *PepsiCo, Inc. (Albert)* and *General Electric Co. (Randall)*, a date discrepancy of as little as one day is sufficient to show that a proponent has failed to satisfy the ownership requirements of Rule 14a-8(b).

The Company satisfied its obligations under Rule 14a-8(f) and complied with the Staff's instructions in SLB 14G by transmitting to the Proponents in a timely manner the Deficiency Notice, which:

- set forth the Rule 14a-8 requirements;
- clearly identified the 2013 Ownership Gap;
- explained that the letters from BNY and State Street “are insufficient because they report on the Proponents’ ownership of the Company’s stock through October 31, 2013 and commencing on November 1, 2013 rather than verifying *continuous* ownership by the Proponents for the entire one-year period” (emphasis in original);
- instructed the Proponents to “obtain new proof of ownership letters verifying their continuous ownership of the requisite number of Company shares for the one-year period preceding and including October 28, 2014, the date the Proposal was submitted to the Company”; and
- attached a copy of both Rule 14a-8 and SLB 14F.

See Exhibit B. In this respect, the Deficiency Notice fully satisfied SLB 14G by specifically identifying the 2013 Ownership Gap, explaining why the Proponents’ proof of ownership was insufficient, and explaining what the Proponents must do to remedy the defects in their proof of ownership letters. *Compare DST Systems, Inc.* (avail. Feb. 4, 2014) (Staff noted that “DST’s request for additional information from the proponent did not mention the gap in the period of ownership covered by the proponent’s proof of ownership letters”). Unlike the stockholders in *Associated Estates Realty Corp.*, *Bank of America Corp.*, *Moody’s Corp.*, *Eastman Kodak Co.* and *Comshare, Inc.*, here the Proponents failed to adequately demonstrate their continuous ownership through a change in the record holder for their shares, notwithstanding that the Company provided a timely deficiency notice that specifically described the defect in the Proponents’ submission and explained what the Proponents must do to remedy the defect. Just as with the stockholders in *PepsiCo, Inc. (Albert)* and *General Electric Co. (Randall)*, the Proponents’ failure to respond in a timely and adequate manner to the Deficiency Notice renders the Proposal excludable under Rules 14a-8(b) and 14a-8(f).

GIBSON DUNN

Office of Chief Counsel
Division of Corporation Finance
January 20, 2015
Page 10

Based on the foregoing, the Proponents failed to establish eligibility to submit the Proposal under Rule 14a-8(b), even after the Company provided timely notice of the 2013 Ownership Gap deficiency. Accordingly, the Proposal may be excluded from the 2015 Proxy Materials pursuant to Rule 14a-8(f).

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 2015 Proxy Materials.

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. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8287, or Melissa K. Caen, the Company's Secretary, at (404) 506-0684.

Sincerely,



Elizabeth A. Ising

Enclosures

cc: Melissa K. Caen, The Southern Company
Michael Garland, Assistant Comptroller

101850834.4

GIBSON DUNN

EXHIBIT A



CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
SCOTT M. STRINGER

MUNICIPAL BUILDING
ONE CENTRE STREET, ROOM 629
NEW YORK, N.Y. 10007-2341

Michael Garland
ASSISTANT COMPTROLLER
ENVIRONMENTAL, SOCIAL AND
GOVERNANCE

TEL: (212) 669-2517
FAX: (212) 669-4072
MGARLAN@COMPTROLLER.NYC.GOV

October 27, 2014

Ms. Melissa K. Caen
Corporate Secretary
The Southern Company
30 Ivan Allen Jr. Boulevard NW
Atlanta, GA 30308

Dear Ms. Caen:

I write to you on behalf of the Comptroller of the City of New York, Scott M. Stringer. The Comptroller is the custodian and a trustee of the New York City Employees' Retirement System, the New York City Fire Department Pension Fund, the New York City Teachers' Retirement System, and the New York City Police Pension Fund, and custodian of the New York City Board of Education Retirement System (the "Systems"). The Systems' boards of trustees have authorized the Comptroller to inform you of their intention to present the enclosed proposal for the consideration and vote of stockholders at the Company's next annual meeting.

Therefore, we offer the enclosed proposal for the consideration and vote of shareholders at the Company's next annual meeting. It is submitted to you in accordance with Rule 14a-8 of the Securities Exchange Act of 1934, and I ask that it be included in the Company's proxy statement.

Letters from The Bank of New York Mellon Corporation and State Street Bank and Trust Company certifying the Systems' ownership, for over a year, of shares of The Southern Company common stock are enclosed. Each System intends to continue to hold at least \$2,000 worth of these securities through the date of the Company's next annual meeting.

We would be happy to discuss the proposal with you. Should the Board of Directors decide to endorse its provision as corporate policy, we will withdraw the proposal from consideration at the annual meeting. If you have any questions on this matter, please feel free to contact me at (212) 669-2517.

Sincerely,

Michael Garland

Enclosure

RESOLVED: Shareholders of The Southern Company (the "Company") ask the board of directors (the "Board") to adopt, and present for shareholder approval, a "proxy access" bylaw. Such a bylaw shall require the Company to include in proxy materials prepared for a shareholder meeting at which directors are to be elected the name, Disclosure and Statement (as defined herein) of any person nominated for election to the board by a shareholder or group (the "Nominator") that meets the criteria established below. The Company shall allow shareholders to vote on such nominee on the Company's proxy card.

The number of shareholder-nominated candidates appearing in proxy materials shall not exceed one quarter of the directors then serving. This bylaw, which shall supplement existing rights under Company bylaws, should provide that a Nominator must:

- a) have beneficially owned 3% or more of the Company's outstanding common stock continuously for at least three years before submitting the nomination;
- b) give the Company, within the time period identified in its bylaws, written notice of the information required by the bylaws and any Securities and Exchange Commission rules about (i) the nominee, including consent to being named in the proxy materials and to serving as director if elected; and (ii) the Nominator, including proof it owns the required shares (the "Disclosure"); and
- c) certify that (i) it will assume liability stemming from any legal or regulatory violation arising out of the Nominator's communications with the Company shareholders, including the Disclosure and Statement; (ii) it will comply with all applicable laws and regulations if it uses soliciting material other than the Company's proxy materials; and (c) to the best of its knowledge, the required shares were acquired in the ordinary course of business and not to change or influence control at the Company.

The Nominator may submit with the Disclosure a statement not exceeding 500 words in support of the nominee (the "Statement"). The Board shall adopt procedures for promptly resolving disputes over whether notice of a nomination was timely, whether the Disclosure and Statement satisfy the bylaw and applicable federal regulations, and the priority to be given to multiple nominations exceeding the one-quarter limit.

SUPPORTING STATEMENT

We believe proxy access is a fundamental shareholder right that will make directors more accountable and contribute to increased shareholder value. The CFA Institute's 2014 assessment of pertinent academic studies and the use of proxy access in other markets similarly concluded that proxy access:

- Would "benefit both the markets and corporate boardrooms, with little cost or disruption."
- Has the potential to raise overall US market capitalization by up to \$140.3 billion if adopted market-wide. (<http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2014.n9.1>)

The proposed bylaw terms enjoy strong investor support – votes for similar shareholder proposals averaged 55% from 2012 through September 2014 – and similar bylaws have been adopted by companies of various sizes across industries, including Chesapeake Energy,

Hewlett-Packard, Western Union and Verizon.

We urge shareholders to vote FOR this proposal.



BNY MELLON

BNY Mellon Asset Servicing

October 27, 2014

To Whom It May Concern

Re: The Southern Company

Cusip #: 842587107

Dear Madame/Sir:

The purpose of this letter is to provide you with the holdings for the above referenced asset continuously held in custody from October 27, 2013 through October 31, 2013 at The Bank of New York Mellon, DTC participant #901 for the New York City Employees' Retirement System shares.

The New York City Employees' Retirement System

628,175 shares

Please do not hesitate to contact me should you have any specific concerns or questions.

Sincerely,

Richard Blanco
Vice President



BNY MELLON

BNY Mellon Asset Servicing

October 27, 2014

To Whom It May Concern

Re: The Southern Company

Cusip #: 842587107

Dear Madame/Sir:

The purpose of this letter is to provide you with the holdings for the above referenced asset continuously held in custody from October 27, 2013 through October 31, 2013 at The Bank of New York Mellon, DTC participant #901 for the New York City Police Pension Fund.

The New York City Police Pension Fund

169,242 shares

Please do not hesitate to contact me should you have any specific concerns or questions.

Sincerely,

Richard Blanco

Vice President



BNY MELLON

BNY Mellon Asset Servicing

October 27, 2014

To Whom It May Concern

Re: The Southern Company

Cusip #: 842587107

Dear Madame/Sir:

The purpose of this letter is to provide you with the holdings for the above referenced asset continuously held in custody from October 27, 2013 through October 31, 2013 at The Bank of New York Mellon, DTC participant #901 for the New York City Teachers' Retirement System.

The New York City Teachers' Retirement System

818,913 shares

Please do not hesitate to contact me should you have any specific concerns or questions.

Sincerely,

Richard Blanco
Vice President



BNY MELLON

BNY Mellon Asset Servicing

October 27, 2014

To Whom It May Concern

Re: The Southern Company

Cusip #: 842587107

Dear Madame/Sir:

The purpose of this letter is to provide you with the holdings for the above referenced asset continuously held in custody from October 27, 2013 through October 31, 2013 at The Bank of New York Mellon, DTC participant #901 for the New York City Fire Department Pension Fund.

The New York City Fire Department Pension Fund

46,786 shares

Please do not hesitate to contact me should you have any specific concerns or questions.

Sincerely,

Richard Blanco
Vice President



BNY MELLON

BNY Mellon Asset Servicing

October 27, 2014

To Whom It May Concern

Re: The Southern Company

Cusip #: 842587107

Dear Madame/Sir:

The purpose of this letter is to provide you with the holdings for the above referenced asset continuously held in custody from October 27, 2013 through October 31, 2013 at The Bank of New York Mellon, DTC participant #901 for the New York City Board of Education Retirement System.

The New York City Board of Education Retirement System 54,276 shares

Please do not hesitate to contact me should you have any specific concerns or questions.

Sincerely,

Richard Blanco
Vice President



STATE STREET

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
Public Funds Services
1200 Crown Colony Drive 5th Floor
Quincy, MA, 02169
Telephone: (617) 784-6378
Facsimile: (617) 788-2211

djfarrell@statestreet.com

October 27, 2014

Re: New York City Employee's Retirement System

To whom it may concern,

Please be advised that State Street Bank and Trust Company-held in custody continuously, on behalf of the New York City Employee's Retirement System, the below position from November 1, 2013 through today as noted below:

Security: SOUTHERN CO/THE

Cusip: 842587107

Shares: 558,741

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell
Assistant Vice President



STATE STREET

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
Public Funds Services
1200 Crown Colony Drive 5th Floor
Quincy, MA, 02169
Telephone: (617) 784-6378
Facsimile: (617) 786-2211

dfarrell@statestreet.com

October 27, 2014

Re: New York City Police Pension Fund

To whom it may concern,

Please be advised that State Street Bank and Trust Company held in custody continuously, on behalf of the New York City Police Pension Fund, the below position from November 1, 2013 through today as noted below:

Security: SOUTHERN CO/THE

Cusip: 842587107

Shares: 162,543

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell
Assistant Vice President



STATE STREET.

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
Public Funds Services
1200 Crown Colony Drive 5th Floor
Quincy, MA, 02169
Telephone: (617) 784-6378
Facsimile: (617) 786-2211

dfarrell@statesreet.com

October 27, 2014

Re: New York City Teachers' Retirement System

To whom it may concern,

Please be advised that State Street Bank and Trust Company held in custody continuously, on behalf of the New York City Teachers' Retirement System, the below position from November 1, 2013 through today as noted below:

Security: SOUTHERN CO/THE

Cusip: 842587107

Shares: 749,770

Please don't hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Derek A. Farrell".

Derek A. Farrell
Assistant Vice President



STATE STREET

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
Public Funds Services
1200 Crown Colony Drive 5th Floor
Quincy, MA, 02169
Telephone: (617) 784-6378
Facsimile: (617) 786-2211

dfarrell@statestreet.com

October 27, 2014

Re: New York City Fire Department Pension Fund

To whom it may concern,

Please be advised that State Street Bank and Trust Company held in custody continuously, on behalf of the New York City Fire Department Pension Fund, the below position from November 1, 2013 through today as noted below:

Security: SOUTHERN CO/THE

Cusip: 842587107

Shares: 39,786

Please don't hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Derek A. Farrell".

Derek A. Farrell
Assistant Vice President



STATE STREET

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
Public Funds Services
1200 Crown Colony Drive 5th Floor
Quincy, MA, 02169

Telephone: (617) 784-6378
Facsimile: (617) 786-2211

d Farrell@statestreet.com

October 27, 2014

Re: New York City Board of Education Retirement System

To whom it may concern,

Please be advised that State Street Bank and Trust Company held in custody continuously, on behalf of the New York City Board of Education Retirement System, the below position from November 1, 2013 through today as noted below:

Security: SOUTHERN CO/THE

Cusip: 842587107

Shares: 54,704

Please don't hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Derek A. Farrell".

Derek A. Farrell
Assistant Vice President

GIBSON DUNN

EXHIBIT B

Matthew D. Bozzelli
Assistant Secretary

The Southern Company
30 Ivan Allen Jr. Boulevard NW
Bin SC1203
Atlanta, Georgia 30308

Tel 404.506.0439
Fax 404.506.0344
mdbozzel@southernco.com



November 7, 2014

VIA OVERNIGHT MAIL

New York City Employees' Retirement System
New York City Fire Department Pension Fund
New York City Teachers' Retirement System
New York City Police Pension Fund
New York City Board of Education Retirement System
c/o Comptroller of the City of New York
Municipal Building
One Centre Street, Room 629
New York, NY 10007-2341

Attention: Michael Garland, Assistant Comptroller

Dear Mr. Garland:

I am writing on behalf of The Southern Company (the "Company"), which received on October 29, 2014, the stockholder proposal you submitted on behalf of the Comptroller of the City of New York as custodian and trustee of the New York City Employees' Retirement System, the New York City Fire Department Pension Fund, the New York City Teachers' Retirement System and the New York City Police Pension Fund and as custodian of the New York City Board of Education Retirement System (collectively, the "Proponents") pursuant to Securities and Exchange Commission ("SEC") Rule 14a-8 for inclusion in the proxy statement for the Company's 2015 Annual Meeting of Stockholders (the "Proposal").

The Proposal contains certain procedural deficiencies, which SEC regulations require us to bring to the Proponents' attention. Rule 14a-8(b) under the Securities Exchange Act of 1934, as amended, provides that stockholder proponents must submit sufficient proof of their continuous ownership of 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 stockholder proposal was submitted. The Company's stock records do not indicate that the Proponents are record owners of sufficient shares to satisfy this requirement. In addition, to date we have not received adequate proof that the Proponents have satisfied Rule 14a-8's ownership requirements as of October 28, 2014, the date that the Proposal was submitted to the Company. The letters dated October 27, 2014 from BNY Mellon and State Street Bank and Trust Company enclosed with the Proposal (the "Bank Letters") are insufficient because they verify ownership from October 27, 2013 through October 31, 2013 and from November 1, 2013 through October 27, 2014 rather than for the entire one-year period preceding and including October 28, 2014, the date the

New York City Employees' Retirement System
New York City Fire Department Pension Fund
New York City Teachers' Retirement System
New York City Police Pension Fund
New York City Board of Education Retirement System
c/o Comptroller of the City of New York

November 7, 2014

Page 2

Proposal was submitted to the Company. In addition, the Bank Letters are insufficient because they report on the Proponents' ownership of the Company's stock through October 31, 2013 and commencing on November 1, 2013 rather than verifying *continuous* ownership by the Proponents for the entire one-year period.

To remedy these defects, the Proponents must obtain new proof of ownership letters verifying their continuous ownership of the requisite number of Company shares for the one-year period preceding and including October 28, 2014, the date the Proposal was submitted to the Company. As explained in Rule 14a-8(b) and in SEC staff guidance, sufficient proof must be in the form of:

- a written statement from the "record" holder of the Proponents' shares (usually a broker or a bank) verifying that the Proponents continuously held the requisite number of Company shares for the one-year period preceding and including October 28, 2014; or
- if the Proponents have filed with the SEC a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5, or amendments to those documents or updated forms, reflecting the Proponents' ownership of the requisite number 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 the Proponents continuously held the requisite number of Company shares for the one-year period.

If the Proponents intend to demonstrate ownership by submitting a written statement from the "record" holder of their shares as set forth in (1) above, please note that 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 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. The Proponents can confirm whether their broker or bank is a DTC participant by asking their broker or bank or by checking DTC's participant list, which is available at <http://www.dtcc.com/~media/Files/Downloads/client-center/DTC/alpha.ashx>. In these situations, stockholders need to obtain proof of ownership from the DTC participant through which the securities are held, as follows:

- (1) If the broker or bank is a DTC participant, then the Proponents need to submit a written statement from the broker or bank verifying that the Proponents continuously held the requisite number of Company shares for the one-year period preceding and including October 28, 2014.

New York City Employees' Retirement System
New York City Fire Department Pension Fund
New York City Teachers' Retirement System
New York City Police Pension Fund
New York City Board of Education Retirement System
c/o Comptroller of the City of New York

November 7, 2014

Page 3

- (2) If the broker or bank is not a DTC participant, then the Proponents need to submit proof of ownership from the DTC participant through which the shares are held verifying that the Proponents continuously held the requisite number of Company shares for the one-year period preceding and including October 28, 2014. The Proponents should be able to find out the identity of the DTC participant by asking their broker or bank. If their broker is an introducing broker, the Proponents may also be able to learn the identity and telephone number of the DTC participant through their account statements, because the clearing broker identified on the account statements will generally be a DTC participant. If the DTC participant that holds the Proponents' shares is not able to confirm the Proponents' individual holdings but is able to confirm the holdings of the Proponents' broker or bank, then the Proponents need to satisfy the proof of ownership requirements by obtaining and submitting two proof of ownership statements verifying that, for the one-year period preceding and including October 28, 2014, the requisite number of Company shares were continuously held: (i) one from the Proponents' broker or bank confirming the Proponents' ownership, and (ii) the other from the DTC participant confirming the broker or bank's ownership.

The SEC's rules require that any response to this letter be postmarked or transmitted electronically no later than 14 calendar days from the date you receive this letter. Please address any response to me at Southern Company Services, Inc., 30 Ivan Allen Jr. Blvd. NW, Bin SC1203, Atlanta, GA 30308. Alternatively, you may transmit any response by facsimile to me at (404) 506-0344.

If you have any questions with respect to the foregoing, please contact me at (404) 506-0439. For your reference, I enclose a copy of Rule 14a-8 and Staff Legal Bulletin No. 14F.

Sincerely,



Matthew D. Bozzelli
Assistant Secretary

Enclosures

Rule 14a-8 – Shareholder Proposals

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 (§240.13d-101), Schedule 13G (§240.13d-102), Form 3 (§249.103 of this chapter), Form 4 (§249.104 of this chapter) and/or Form 5 (§249.105 of this chapter), 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 (§249.308a of this chapter), or in shareholder reports of investment companies under §270.30d-1 of this chapter of the Investment Company Act of 1940. 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 §240.14a-8 and provide you with a copy under Question 10 below, §240.14a-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;

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.

(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;

Note to paragraph (i)(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 would result in a violation of any state or federal law.

(3) *Violation of proxy rules:* If the proposal or supporting statement is contrary to any of the Commission's proxy rules, including §240.14a-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) *Director elections*: 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): A company's submission to the Commission under this section should specify the points of conflict with the company's proposal.

(10) *Substantially implemented*: If the company has already substantially implemented the proposal;

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.

(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, §240.14a-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 its files definitive copies of its proxy statement and form of proxy under §240.14a-6.



**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.

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.¹

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.² 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.³

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.⁴ 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.⁵

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.⁶ 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-8⁷ 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,⁸ 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.⁹

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).¹⁰ 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].”¹¹

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).¹² 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.¹³

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,¹⁴ 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 "fails 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.¹⁵

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.¹⁶

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.

¹ See Rule 14a-8(b).

² 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.").

³ 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).

⁴ 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.

⁵ See Exchange Act Rule 17Ad-8.

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

⁷ 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.

⁸ *Techne Corp.* (Sept. 20, 1988).

⁹ 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.

¹⁰ 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.

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

¹² 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.

¹³ 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.

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

¹⁵ 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.

¹⁶ 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/interp/leg/cfs14f.htm>

[Home](#) | [Previous Page](#)

Modified: 10/18/2011

GIBSON DUNN

EXHIBIT D



Michael Garland
ASSISTANT COMPTROLLER
ENVIRONMENTAL, SOCIAL AND
GOVERNANCE

CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
SCOTT STRINGER

MUNICIPAL BUILDING
ONE CENTRE STREET, ROOM 629
NEW YORK, N. Y. 10007-2341

TEL: (212) 669-2517
FAX: (212) 669-4072
MGARLAN@COMPTROLLER.NYC.GOV

November 14, 2014

Mr. Matthew D. Bozzelli
Assistant Secretary
The Southern Company
30 Ivan Allen Jr. Boulevard NW
Bin SC1203
Atlanta, GA 30308

Dear Mr. Bozzelli:

In response to your letter, dated November 7, 2014, regarding the eligibility of the New York City Employees' Retirement System, the New York City Fire Department Pension Fund, the New York City Teachers' Retirement System, the New York City Police Pension Fund, and the New York City Board of Education Retirement System (the "Systems") to submit a shareholder proposal to The Southern Company (the "Company"), in accordance with SEC Rule 14a-8 (b), I enclose letters from State Street Bank and Trust Company, the Systems' custodian bank since November 1, 2013, certifying that at the time the shareholder proposal was submitted to the Company, each held, continuously since November 1, 2013, at least \$2,000 worth of shares of the Company's common stock. I hereby declare that each intends to continue to hold at least \$2,000 worth of these securities through the date of the Company's next annual meeting.

As you know, I previously provided the Company with letters from The Bank of New York Mellon Corporation certifying that each of the Systems held continuously at least \$2,000 worth of shares of the Company's common stock for the required holding period prior to November 1, 2013.

Our current and former custodian banks have each confirmed that they are DTC participants.

Sincerely,

Michael Garland

Enclosure



STATE STREET

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
Public Funds Services
1200 Crown Colony Drive 5th Floor
Quincy, MA, 02169
Telephone: (617) 784-6378
Facsimile: (617) 786-2211

dfarrell@statestreet.com

November 14, 2014

Re: New York City Employee's Retirement System

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Employee's Retirement System, the below position from November 1, 2013 through today as noted below:

Security: SOUTHERN CO/THE

Cusip: 842587107

Shares: 558,741

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell
Assistant Vice President



STATE STREET.

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
Public Funds Services
1200 Crown Colony Drive 5th Floor
Quincy, MA, 02169
Telephone: (617) 784-6378
Facsimile: (617) 786-2211

dfarrell@statestreet.com

November 14, 2014

Re: New York City Teachers' Retirement System

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Teachers' Retirement System, the below position from November 1, 2013 through today as noted below:

Security: SOUTHERN CO/THE

Cusip: 842587107

Shares: 749,770

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell
Assistant Vice President



STATE STREET.

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
Public Funds Services
1200 Crown Colony Drive 5th Floor
Quincy, MA, 02169
Telephone: (617) 784-6378
Facsimile: (617) 786-2211

dfarrell@statestreet.com

November 14, 2014

Re: New York City Police Pension Fund

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Police Pension Fund, the below position from November 1, 2013 through today as noted below:

Security: SOUTHERN CO/THE

Cusip: 842587107

Shares: 162,543

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell
Assistant Vice President



STATE STREET[®]

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
Public Funds Services
1200 Crown Colony Drive 5th Floor
Quincy, MA, 02169
Telephone: (617) 784-6378
Facsimile: (617) 786-2211

dfarrell@statesstreet.com

November 14, 2014

Re: New York City Fire Department Pension Fund

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Fire Department Pension Fund, the below position from November 1, 2013 through today as noted below:

Security: SOUTHERN CO/THE

Cusip: 842587107

Shares: 39,786

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell
Assistant Vice President



STATE STREET.

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
Public Funds Services
1200 Crown Colony Drive 8th Floor
Quincy, MA, 02169

Telephone: (617) 784-6378
Facsimile: (617) 788-2211

dfarrell@statestreet.com

November 14, 2014

Re: New York City Board of Education Retirement System

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Board of Education Retirement System, the below position from November 1, 2013 through today as noted below:

Security: SOUTHERN CO/THE

Cusip: 842587107

Shares: 54,704

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell
Assistant Vice President