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August 7, 2015

Transmitted via Email: i9review@sec.gov

Keith F. Higgins
Director, Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Staff Review of Exchange Act Rule 14a-8(i)(9)

Dear Mr. Higgins:

The State Board of Administration (SBA) of Florida is pleased to provide comments on the proper scope and application of Exchange Act Rule 14a-8(i)(9) (the "rule"). SBA staff strongly supports the spirit of this review and views this as an opportunity for the SEC to improve the integrity of the proposal submission process used by shareowners to enhance the corporate governance practices of publicly-traded companies. The SBA manages the assets of the Florida Retirement System (FRS), one of the largest public pension plans in the United States with 1.1 million beneficiaries and retirees. The SBA's governance philosophy encourages companies to adhere to responsible, transparent practices that correspond with increasing shareowner value and to appropriately consider the input of their shareowners.

Prior to the Commission's January 16, 2015 announcement[1] suspending the rule for 2015 proposals and committing to a review of the proper scope and application of the rule, SEC staff routinely provided no-action relief to companies on the basis that inclusion of both management and shareholder proposals concerning the same issue would "present alternative and conflicting decisions for the shareholders and would create the potential for inconsistent and ambiguous results"[2]. We are pleased that the Commission halted the application of this rule to re-examine this rationale, and as a long-term investor, we see the opportunity to vote for proposals with differing specifications or supposed conflicts as providing greater flexibility and an essential choice, which is appropriate and necessary for boards to make a clear assessment of shareowner sentiment. While the rule was intended to prevent ambiguity, instead it allows companies to supplant shareowner proposals containing reasonable thresholds and terms with more challenging and often onerous hurdles. This abridges the right of shareowners to make proposals and leads to abuse of the proposal process.

While Rule 14a-8(i)(9) has otherwise intuitive rationale, its historic application is overly broad. In researching the recent usage and application of this rule and reviewing a number of instances where companies excluded a shareowner proposal after receipt of a no-action letter from the Commission, we are troubled by the patterns observed and the number of proposals excluded. The impact has been to curtail investors' ability to propose and

[1] http://www.sec.gov/corpfin/Article/corp-fin-staff-review-of-conflicting-shareholder-proposals.html

[2] From a February 24, 2014 no-action letter to Verisign Inc. concerning the exclusion of a shareowner proposal seeking a vote of the right to call a special meeting at 15%. The company responded with its own proposal which increased the threshold to 35%. All 2013-2014 no action letters under the rule that we reviewed contained the same or similar language quoted here.

vote on reasonable variations of basic governance provisions and, in doing so, unnecessarily infringes on shareowner rights. As an institutional investor managing pension assets for our fiduciaries, the SBA's equity holdings are held in both active and passive portfolios, indexed to broad market benchmarks with a long-term investment horizon. Rather than divest of mismanaged or poorly-governed companies, our long-term horizon actually creates incentives for us to help companies recover from poor performance or take steps to mitigate risk to shareowner value. Shareowner proposals are effective tools in this regard, and measures taken to reduce excessive (i)(9) restrictions and to streamline the submission process could add to market efficiency.

We do have a broader concern that a number of difficulties and obstacles are created in the proposal process which are substantial and deserve to be addressed by the Commission in a full review of rule 14a-8. For example, the effort and technicalities involved in proving share ownership sometimes leads to even large pension funds that hold millions of dollars' worth of shares being challenged on those grounds in making a proposal.[3] The proposals subjected to "ordinary business operations" no-action challenges have grown even as market participants have changed their perception of what factors constitute systemic risk at a company. The 500-word limitation may be impinging on shareowners' ability to craft proxy access proposals with enough specificity, in light of the proliferation of additional terms that issuers have added to their own adopted or proposed policies. Recently, allegations concerning false or misleading statements in proposals have been suggested, to mostly poor reviews by legal scholars, specifying certain academic citations within declassified board proposals (some of which were submitted by the SBA); this area of the broader 14a-8 rule may need clarification as well. As we note in Appendix B, the count of proposals that have been omitted under the provisions of 14a-8 are a substantial proportion of the proposals that went to vote during this period from 2013 through 2015 (omitted proposals number more than 25% of the total proposals that went to a shareowner vote). While many of these are likely valid exclusions, we question the aggregate volume excluded and note that often the proposals were from persons or entities very familiar with the proposal process, calling into question the validity of the rationale for exclusion. Often the issuers sought to exclude proposals on three or more potential 14a-8 mechanisms simultaneously and with arguments bent on obtuse technicalities.[4]

Most in need of review, however, is the requirement for a shareowner or their representative to physically attend a meeting to present the proposal, because this provision is both costly and antiquated.[5] We see no good reason to require such a presence when the vast majority of owners vote via proxy in advance of the meeting and the proposal itself stands on its own. However, technological advances make non-physical appearances, if necessary, easily accomplishable. This requirement now burdens the proposer with additional expense for negligible benefit and reduces the ability of owners to make meaningful, market-wide progress in areas like proxy access, which now requires private ordering at thousands of companies after the Commission's attempt to provide uniform rules for all registered companies was blocked. **For shareowners to make these necessary governance improvements effective in the wider market, the entirety of the rules under 14a-8 are in need of review and update.[6]**

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[3] Chevron Corp. sought but did not receive no-action relief for a proposal filed by a grouping of New York City retirement funds over the technicality of whether a change in custodian constituted a failure to maintain holdings during the required period. See https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/nycretirement022315-14a8.pdf. SBA also has faced baseless holding challenges and litigation threats based on the assets we manage in trust on behalf of beneficiaries.

[4] See company examples here http://corpgov.law.harvard.edu/2015/08/04/independent-chair-proposals/ and here http://www.sec.gov/Archives/edgar/vprr/13/9999999997-13-000840.

[5] Under Rule 14a-8(h)(1), a shareowner or his or her qualified representative must attend the shareowners' meeting to "present" the proposal. If the shareowner or representative does not appear and is without "good cause" for not presenting the proposal, under Rule 14a-8(h)(3) the company can exclude the shareowner's proposal for the next two consecutive years.

[6] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2635695

With respect to the (i)(9) provision, companies seeking to exclude a shareowner proposal under this rule typically cite SEC Release No. 34-40018[7], which amended Rule 14a-8(i)(9),[8] and states in part,

> "As amended, the rule permits a company to exclude a proposal that 'directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting.'[27]"

Note 27 in the above quote is also typically cited by companies in no-action requests[9] and states in part,

> "…we do not intend to imply that proposals must be identical in scope or focus for the exclusion to be available. See, e.g., SBC Communications (Feb. 2, 1996) (shareholder proposal on calculation of non-cash compensation directly conflicted with company's proposal on a stock and incentive plan)."

One concern with the current application of Rule 14a-8(i)(9) is that it appears companies frequently use the rule to omit a precatory shareowner proposal by putting forward a management-sponsored proposal on the same topic with a much more stringent threshold. For example, in 2013 and 2014, the Commission provided no-action letters to companies under the rule for nineteen shareowner proposals that sought a shareowner vote on a precatory proposal to provide or amend the right to call a special meeting. In every case, the company proposal sought a substantially higher threshold for calling a special meeting, and on average, the threshold of shares required to call a special meeting were 217% of the shares required by the shareowner proposal. In addition, nearly half of these companies added time period holding requirements; none of the shareowner proposals included such a stipulation. **As we show in Appendix A, when a numerical threshold is involved, the company proposal typically averages between double and triple the value of the threshold in the original shareowner proposal.**

Among qualitative proposals, we observed a dozen instances in 2013 and 2014 of companies excluding a shareowner proposal concerning a policy to prohibit accelerating the vesting of unearned equity awards with the rationale that it conflicted with a compensation plan that the company had scheduled for the same meeting. This actual and recent scenario underscores the central impact of conflicting interpretation. In this case, the shareowner made the precatory proposal in order for the board to receive input from owners on this practice. Since it was non-binding, the shareowner proposal couldn't prevent implementation of the compensation plan, but it was nonetheless entirely excluded from the ballot. It is regrettable that shareowners were denied the opportunity of a precatory vote on this issue to provide input to the board specific to this practice and independent of the compensation plan vote itself, which has potential tax implications for the company unless approved by shareowners.

In light of these concerns, we strongly advise the Commission to alter its procedures so that the rule does not preclude the ability of shareowners to provide input on such practices. In your recent speech to the Practising

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[7] https://www.sec.gov/rules/final/34-40018.htm
[8] http://www.gpo.gov/fdsys/pkg/CFR-2013-title17-vol3/pdf/CFR-2013-title17-vol3-sec240-14a-8.pdf
[9] Note 27 from the SEC Release states in full "One commenter thought that the word "directly" may appear to signal a narrowing of the exclusion. See ABA Letter. We believe that the revisions accurately convey our current interpretations of the rule; of course, by revising the rule we do not intend to imply that proposals must be identical in scope or focus for the exclusion to be available. See , e.g. , SBC Communications (Feb. 2, 1996) (shareholder proposal on calculation of non-cash compensation directly conflicted with company's proposal on a stock and incentive plan)."

Law Institute members on this topic[10], you noted that assessing the motives of issuers in requesting no-action relief and determining whether they were acting in good faith could be a perilous task for the Commission. However, the motive of issuers is not the relevant matter, only the impact of their actions upon shareowners' rights and the extent to which votes on two categorically similar proposals are truly incompatible. Therefore, we advise the following changes to the application of the rule:

- **Precatory shareowner proposals** should be given wide latitude in scope and form. Since these proposals are not binding, the board is free to consider the information from the shareowner vote without acting on it because the precatory nature prevents truly contradictory or conflicting proposals from being dually implemented. Indeed, boards frequently disregard passing precatory shareowner proposals and shareowner votes on a variety of issues, sometimes for passing votes that continue to repeat for consecutive years.[11] Therefore, we do not believe the voting process or board interpretation of shareowner proposal votes would be problematic for shareowners or boards.
    - If both proposals pass on a topic and the management proposal is binding, then the management proposal will be implemented, but the board is free to further consider the results of the shareowner proposal. The results of the precatory proposal will give the board additional insight that shareowners want to be considered and may provide impetus for increased shareowner engagement on the topic. If the precatory shareowner proposal receives a higher rate of support than the management proposal, then it is clear that shareowners view the terms of that proposal more favorably, an outcome the board should further consider. If both proposals are precatory, the board may compare the votes of each.
    - If only the precatory shareowner proposal passes, the board has strong evidence that shareowners do not approve of the terms of the management proposal, but do approve of the topic generally and prefer the precatory proposal terms.
    - If only the management proposal passes, the board has strong evidence that owners approve of the topic generally and support the terms of the management proposal. The management proposal can be implemented, and the failed precatory proposal can be disregarded by management.
    - If both proposals fail, the board has clear evidence that shareowners do not approve of the topic as presented in the terms of both proposals.

  A precatory shareowner proposal vote outcome does not bind the board or create a true conflict in any situation.

- **Binding shareowner proposals**, which are comparatively quite rare, could be handled in one of two ways. Ideally, if the binding proposals are similar in nature and differ on numerical thresholds (as in proposals for proxy access and rights to call special meetings), voting on both should be allowed and the highest *passing* vote, if either, implemented. If this plurality-style method of adoption is unfeasible, we

[10] February 10, 2015 speech to the Practising Law Institute Program on Corporate Governance, text available at: http://www.sec.gov/news/speech/rule-14a-8-conflicting-proposals-conflicting-views-.html

[11] Recently, shareowner proposals have passed multiple years without company implementation at Nabors Industries Ltd, Texas Roadhouse Inc, Vornado Realty Trust, and Netflix (two proposals to adopt simple majority vote and to declassify the board of directors, the latter submitted by the SBA), as tracked by the Council of Institutional Investors (available in the members-only area at www.cii.org). Shareowners don't always pursue resubmission when a company fails to implement a passing shareowner proposal. Seven companies have failed to correct deficiencies in their compensation structures as evidenced by failing say-on-pay votes for between two and five years according to CII's tracking, and twelve directors have received failing votes for the same director for two or three straight years, according to their data.

would join with other investors who have written comments to the Commission on this issue[12] in asking that the shareowner sponsoring the binding proposal should be granted an opportunity to resolve the direct conflict by revising the proposal so as to make it advisory.

The SBA looks forward to the staff's deliberation and guidance on this issue. We encourage the division to look closely at all of the exclusion provisions of Rule 14a-8 and consider whether their present application unnecessarily impedes meaningful shareowner input. Thank you for your consideration and if you have any questions, please feel free to contact me at [redacted], or at governance@sbafla.com.

Sincerely,

Michael P. McCauley
Senior Officer, Investment Programs and Governance

cc: SBA Corporate Governance & Proxy Voting Oversight Group

[12] http://www.sec.gov/comments/i9review/i9review-10.pdf

Appendix A

14a-8(i)(9) no-action letters summary for 2013-2014

(summary data provided by Institutional Shareholder Services
and supplemented by Edgar.sec.gov no-action filings)

Proposal: Amend Articles/Bylaws/Charter - Call Special Meeting

Company	Meeting Date	Shareowner proposed threshold	Management proposed threshold
Advance Auto Parts, Inc.	22-May-13	10	25
Aetna Inc.	30-May-14	15	25
American Tower Corporation	21-May-13	10	25*
AmerisourceBergen Corporation	6-Mar-14	10	25
Baxter International Inc.	7-May-13	10	25
CF Industries Holdings, Inc.	14-May-14	15	25
Con-way Inc.	13-May-14	15	25*
Dominion Resources, Inc.	3-May-13	10	33.3
Dover Corporation	1-May-14	10	25
Kansas City Southern	1-May-14	15	25*
Norfolk Southern Corporation	9-May-13	10	20
O'Reilly Automotive, Inc.	7-May-13	10	25
Quest Diagnostics Incorporated	21-May-14	15	25*
Stericycle, Inc.	21-May-14	15	25*
The Walt Disney Company	18-Mar-14	10	25*
The Western Union Company	30-May-13	10	20
United Continental Holdings, Inc.	12-Jun-13	10	25
VeriSign, Inc.	22-May-14	15	35*
Yahoo! Inc.	25-Jun-14	15	25
Averages		12.11	25.46
Count: 19			

*also requires a net long position for 1 year or more

Proposal: Adopt Pro-Rata Vesting of Unearned Equity Awards/Limit Accelerated Vesting

Company	Meeting Date
Verizon Communications Inc.	5/2/2013
Pitney Bowes Inc.	5/13/2013
Union Pacific Corporation	5/16/2013
Southwestern Energy Company	5/21/2013
Starwood Hotels & Resorts Worldwide, Inc.	5/30/2013
Medtronic Plc	8/22/2013
Sysco Corporation	11/15/2013
Praxair, Inc.	4/22/2014
The Boeing Company	4/28/2014
ConocoPhillips	5/13/2014
Community Health Systems, Inc.	5/20/2014
McKesson Corporation	7/31/2013
Count: 13	

Appendix A
14a-8(i)(9) no-action letters summary for 2013-2014

(summary data provided by Institutional Shareholder Services
and supplemented by Edgar.sec.gov no-action filings)

Proposal: Adopt Proxy Access

Company	Meeting Date	Shareowner proposed threshold	Management proposed threshold
The Western Union Company	5/30/2013	1% owned for 1 yr	3% owned for 3 yrs

Proposal: Provide Right to Act by Written Consent

Company	Meeting Date	Shareowner proposed threshold	Management proposed threshold
NYSE Euronext	4/25/2013	minimum required	10%
EMC Corporation	5/1/2013	minimum required	25%*
The Dun & Bradstreet Corporation	5/8/2013	minimum required	40%
Kate Spade & Company	5/14/2013	minimum required	35%
JPMorgan Chase & Co.	5/21/2013	minimum required	20%*
Equinix, Inc.	6/5/2013	minimum required	25%
Raytheon Company	5/29/2014	minimum required	25%
Average			27%
Count: 7			

*net long position

Proposal: Reduce Supermajority Voting Provisions

Company	Meeting Date	Shareowner proposed threshold	Management proposed threshold
L-3 Communications Holdings, Inc.	4/30/2013	>50% votes cast	>50% shares outstanding
Con-way Inc.	5/7/2013	>50% votes cast	>50 or 66.67% outstanding*
CVS Health Corp	5/9/2013	>50% votes cast	>50% shares outstanding
Nucor Corporation	5/9/2013	>50% votes cast	>66.67 or 70% outstanding*
OGE Energy Corp.	5/16/2013	>50% votes cast	>50% shares outstanding
FirstEnergy Corp.	5/21/2013	>50% votes cast	>50% shares outstanding
The Southern Company	5/22/2013	>50% votes cast	>66.67% shares outstanding
The NASDAQ OMX Group, Inc.	5/22/2013	>50% votes cast	>50% shares outstanding
Leidos Holdings, Inc.	6/7/2013	>50% votes cast	>66.67 or 80% outstanding*
Ellie Mae, Inc.	5/21/2014	>50% votes cast	>50% shares outstanding
Count: 10			

*different standard applies based on the voting item

Appendix B

14a-8 no-action letters summary for 2013-2015

by reason code

(data provided by Institutional Shareholder Services)

14a-8 Reason code:	times omitted	comments
B-1 Proponent failed to meet requirements for ownership of stock entitled to be voted on.	20 times	6 of the proposals excluded were from common filers knowledgeable and familiar with the requirements such as James McRitchie, John Chevedden, Myra Young, Philadelphia Public Employees Retirement System, and United Brotherhood of Carpenters Pension Fund.
B-2 Proponent did not provide verification of stock ownership.	67 times	21 of the proposals excluded were from common filers knowledgeable and familiar with the requirements such as NY State Common Retirement Fund, James McRitchie, John Chevedden, Myra Young, Philadelphia Public Employees Retirement System, As You Sow Foundation, Miami Firefighters, Kansas City Firefighters, Domini Social Investments, and Marco Consulting.
H-3 Proponent did not have "good cause" for failure to present the proposal at the previous annual meeting.	3 times	2 proposals filed by Marco Consulting and John Chevedden were excluded. If not properly presented, the company may exclude proponent's resolutions for the next two years.
I-2 proposal is counter to any relevant state, federal or foreign law.	5 times	Often these proposals cover voting thresholds, and in at least one case we reviewed (Abbott Laboratories), the company could simply opt out of the state law thresholds.
I-3 Proposal contains false or misleading statements.	51 times	The topics included topics such as confidential voting, independent chairman, and prohibiting accelerated vesting upon a change in control.
I-6 Proposal deals with a matter beyond the company's power to effectuate.	1 time	Goldman Sachs made the argument that the non-binding shareowner proposal to require an independent chairman was beyond the power of the board to implement because the proposal cited no cure for the company if the chairman ceased to be independent during his/her tenure.
I-7 Proposal deals with a subject relating to the ordinary business operations of the company.	86 times	A number of the excluded proposals asked the company to simply report on various risks associated with the conduct of their business.
I-9 Is counter to a proposal to be submitted by management at the meeting.	54 times	Since the (i)(9) provision was suspended by Chair White for 2015, this count applies to proposals submittedd in 2013 and 2014 only.
I-10 Proposal is moot by being substantially implemented by the company.	61 times	The topics covered included written consent, right to call a special meeting, supermajority voting provisions, and majority voting in director elections. Like the (i)(9) rule, this facet of 14a-8 allows companies to implement policies with much different provisions than those of the shareowner proposal.

I-11 Proposal is a duplicate of a proposal submitted earlier.	12 times	For similar proposals and received by the issuer for the same meeting.
I-12 Proposal deals with "substantially the same subject matter" as an earlier proposal.	15 times	A similar proposal was included in the company's proxy materials for a meeting within the preceding five years and did not meet the necessary threshhold required for resubmission (i-12-i: 3%, i-12-ii: 6%, i-12-iii: 10%).