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June 17, 2015

Mr. Keith F. Higgins
Director, Division of Corporate Finance
Securities and Exchange Division
100 F Street, N.E.
Washington, D.C. 20549

Via email: i9review@sec.gov

Re: Interpretation of Rule 14a-8(i)(9)

Dear Director Higgins:

I write on behalf of the New York City Employees' Retirement System, the Teachers' Retirement System of the City of New York, the New York City Police Pension Fund, the New York City Fire Department Pension Fund, and the New York City Board of Education Retirement System (collectively the "NYC Systems") in light of the January 16, 2015, announcement that the Division of Corporate Finance (the "Division") would suspend interpretation of Rule 14a-8(i)(9), the "conflicting proposal" provision (or the "Rule"), during the 2015 proxy season and undertake a review of the Rule's application.¹ This letter supplements our letter to the Division of January 15, 2015, on the subject of the application of the Rule to proxy access proposals.

The NYC Systems have approximately \$160 billion in assets invested on behalf of 715,000 active and retired New York City employees. As long-term investors in U.S. capital markets, the NYC Systems have an extensive history of advocating governance practices at portfolio companies that we believe will promote sustainable value creation. Rule 14a-8 plays a crucial role in enabling shareowners, such as the NYC Systems, to present to boards and fellow shareowners a proposed reform and to register votes via proxy on other proponents' proposals, thereby enabling boards to gauge shareowner sentiment on suggested reforms. Indeed, many governance practices in the U.S. market have gained traction and subsequent widespread adoption via the Rule 14a-8 process, such as the spread of majority voting standards for director nominees, clawback policies, and annual elections for directors.

¹ Statement from Chair Mary Jo White. January 16, 2015. <http://www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html>. See also Announcement from Division of Corporate Finance. January 16, 2015. <http://www.sec.gov/corpfin/announcement/cf-announcement---rule-14a-8i9-no-views.html>.

We are grateful for the Division’s work to adjudicate no-action requests and we believe there is a role for guidelines to ensure that the shareowner resolution process promotes efficiency, balance, and integrity. We are concerned, however, that prior to the January 16 announcement, the Division’s recent broad interpretation of Rule 14a8(i)(9) had denied shareowners the ability to present and vote on proposed reforms and enabled gamesmanship by companies. We therefore welcome the Division’s review of the Rule’s interpretation.

The Division has the opportunity to consider the voting results of the 2015 proxy season to inform its review. Based on our examination of these results, we believe the Division should define a narrow interpretation of the Rule by which two proposals addressing the same subject should only be viewed as conflicting if they would bind a board to enact incontrovertibly irreconcilable proposals. As the circumstances in which even two binding proposals could truly present a clear conflict are very limited – perhaps, for example an independent chair proposal vs. a combined Chair/CEO proposal – the Staff should avoid the risk of denying investors the right to vote, particularly since the binding-precatory combination effectively eliminates the risk of any harm.

The results of the 2015 proxy season demonstrate that such a narrow interpretation would adhere to the mandate of the Rule, would not result in “directly conflicting” proposals, would not result in “confusing or ambiguous results,” and would avoid the specter of gamesmanship in the market. In contrast, a broad interpretation would frustrate the use of private ordering on matters such as proxy access, by preventing shareowners from communicating to management useful information on their preferences. We take each point in turn below.

The Division Has the Authority to Issue an Interpretation Without Notice-And-Comment

The U.S. Supreme Court recently held in *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (Mar. 9, 2015), that the Administrative Procedure Act (APA) exempts agencies issuing interpretive rules from notice and comment requirements. The *Perez* Court underscored that §4 of the APA “specifically exempts interpretive rules from notice-and-comment procedures. Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures to amend or repeal that rule.” *Id.* at 1200. As the prior views of the Division and its Staff are only interpretations of the Rule, the Division may change its interpretation of the Rule without requiring notice and comment.²

NYC Systems’ Interest in the Rule

The NYC Systems have a particular interest in an effective and balanced interpretation of the Rule. For the 2015 proxy season, the NYC Systems sponsored 75 precatory shareowner resolutions requesting that portfolio companies adopt bylaws to enable shareowner access to the proxy (“proxy access”). The resolution is modeled on the vacated Securities and Exchange Commission (the “SEC”) rule that would have enabled holders of 3% of shares, who have held such shares for at least 3 years, to nominate on the proxy up to 25% of a board. Additional investors filed at least 25 additional proposals based on the same or a substantially similar model. We believe that

² The June 10, 2015, letter from five corporate law firms to the Division erroneously asserts that a change in the Division’s interpretation of the Rule would be something more than an interpretive rule. That letter did not cite or discuss the U.S. Supreme Court’s *Perez* ruling. <http://www.sec.gov/comments/i9review/i9review-5.pdf>.

had the SEC not suspended issuing advice on the Rule, shareowners would have been denied the ability to vote on many of these resolutions.

Voting results from the 2015 annual meetings, as laid out in Table 1, demonstrate strong market support for proxy access resolutions based on the SEC’s 3%/3 year/25% model. Table 1 summarizes voting results on 2015 NYC Systems-sponsored proxy access proposals for which final vote tabulations have been filed with the SEC. (See Appendix A for a full list of voting results.) Voting results on other proponents’ proxy access resolutions, which were substantially similar, are largely similar.

Table 1: Voting Results of 2015 NYC Systems Proxy Access Proposals³

	NYC Systems Resolutions
Number of companies agreeing to implement proposal before annual meeting vote	6
Total number of proposals voted for which final results are available	59
Percentage of proposals passing	64.41%
Percentage of “near misses” (proposals receiving 45%-49.9%)	18.64%
Total percentage of proposals receiving 45% or higher support	83.05%
Percentage of proposals receiving above 70% support	11.86%
Average level of support for all shareowner proposals	56.62%
Average support for passing proposals	63.46%
Average level of support for failed proposals	44.24%
Average level of support for “competing” board proposals	41.79%

Six companies agreed with the reform and announced prior to a shareowner vote their intent to adopt proxy access, prompting withdrawals of the proposals. To date, we have final voting results for 59 of the 62 proxy access proxy proposals that have been voted upon. Almost two-thirds (64%) have received majority support. The average voting support has been 57%. Seven resolutions (or 12%) have received over 70% support, with the highest receiving 93% and 90%. Of the proposals receiving over 50% support, the average vote as been 63%. Of the resolutions that did not obtain greater than 50% support, 11 proposals (or 19%) have fallen within 5% points of reaching majority (i.e. obtained between 45% and 49.9% support). Remarkably, 83% of proposals received 45% support or above.

Among proposals receiving less than majority support, the average vote remained above 40%, despite board opposition and high insider ownership at several companies. At the two companies that did not oppose the resolutions (*i.e.*, made no recommendation or recommended votes in favor of the resolution), the proposals garnered almost unanimous support: 93% at Apache Corporation and 90% at Republic Services, Inc.

We know of few, if any, other shareowner resolution topics that have garnered the same level of immediate and substantial support and traction among investors as has the 3%/3 year/25% model of the proxy access proposal.

³ Table 1 summarizes all NYC Systems-sponsored proxy access proposals voted during 2015 for which companies have disclosed vote results in SEC filings as of June 16, 2015.

It is important to note that shareowner support for board-sponsored “competing” proxy access proposals (most with 5% ownership thresholds) has been far more modest, averaging only 42% and failing in the majority of votes. Thus, if the shareowner 3% proposals and the strong vote results on those proposals had been disallowed this season, companies might have erroneously concluded that investor sentiment for proxy access was tepid at best. The shareowner proxy access proposals thus provided valuable information to issuers and investors alike.

No shareowners encountered multiple proxy proposals in 2015 that “directly conflicted”

In 2015, seven companies filed proxy statements that presented to shareowners both a management-sponsored and a shareowner-sponsored proposal for proxy access. None of the seven companies encountered inherently opposing proposals. All seven shareowner proposals, and all but two company proposals, were only advisory in nature.

Table 2: Nature of Proposals When Two Proxy Access Proposals Appeared on 2015 Proxies

Company	Board Proposal	Shareowner Proposal
AES Corporation	Non-binding	Non-binding
Chipotle Mexican Grill	Binding	Non-binding
CloudPeak Energy	Binding	Non-binding
Exelon	Non-binding	Non-binding
Expeditors International	Non-binding	Non-binding
SBA Communications	Non-binding	Non-binding
Visteon Corporation	Non-binding	Non-binding

Thus, each company simply received mostly advisory shareowner feedback on their preferences as to proxy access. Neither shareowners nor managers were confused.

Moreover, of the companies that presented board-sponsored, non-binding proposals, several stated in their proxies that they saw the benefit of presenting two proposals on the same topic in their proxies in order to gauge investor sentiment on the different proxy access models proposed in each. For example, AES Corporation wrote in its 2015 proxy:

In light of the Stockholder Proxy Access Proposal set forth in Proposal 9 and the considerations addressed in this Proposal 7, ***the Board determined that stockholders should be provided the opportunity to consider alternative provisions under which proxy access may be implemented.*** Both the Management Proxy Access Proposal and the Stockholder Proxy Access Proposal are not binding, meaning that approval of either or both will not result in an amendment of the By-Laws. Although the Board could have adopted or proposed for stockholder approval an amendment to the By-Laws to provide for proxy access, the Board determined that any decision to implement the Management Governance Proposals and/or the Stockholder Proposals should be addressed at the same time, after stockholders have had an opportunity to evaluate and vote on the alternative and conflicting terms of those proposals.⁴ (*Emphasis added.*)

⁴ AES Corporation. 2015 Proxy Statement. P. 66.
<http://www.sec.gov/Archives/edgar/data/874761/000087476115000014/a2015proxystatement.htm#s348bf3efdd2b420cbf7962af0495e861>

Similarly, Exelon wrote in its 2015 proxy:

... Accordingly, ***the board believes that shareholders should have the opportunity to consider alternative proxy access proposals.*** ... The board will take into consideration the shareholder vote for and against each proposal and will also seek additional shareholder input on proxy access through Exelon's long-standing program of outreach to its shareholders. If a majority of shares represented at the meeting in person or by proxy and eligible to vote are voted in favor of either proxy access proposal, Exelon intends to bring to a vote at the 2016 annual meeting of shareholders a binding proposal for amendments to Exelon's bylaws to implement some form of proxy access.⁵ (*Emphasis added.*)

Visteon Corporation likewise stated:

...[T]he Board determined that stockholders should be provided the opportunity to consider alternative provisions under which proxy access may be implemented. ...

Although the Board could have submitted a binding proposal for stockholder approval an amendment to the Bylaws to provide for proxy access, the Board determined that any decision to implement proxy access through amendments to the Bylaws should be addressed after stockholders have had an opportunity to evaluate and vote on the alternative and conflicting terms of the Management Proxy Access Proposal and the Stockholder Proxy Access Proposal.⁶ (*Emphasis added.*)

The evidence from the season underscores our view, and several companies appear to agree, that two proposals cannot be fundamentally conflicting as long as at least one of the two proposals is non-binding in nature.

Despite the SEC suspension of the Rule, NO companies experienced voting results that were "inconsistent and ambiguous."

Table 3 below details the voting results at each of the seven companies where shareowners voted on two proxy access proposals. In all cases other than Expeditors International, the board proposal required 5% ownership thresholds, among other differing terms. At Expeditors International, the board proposed a 3% ownership requirement for 3 years, but limited the nominating group to no more than twenty shareowners and the slate size to 20% of the board.

The diverse support levels shown in Table 3 indicate that shareowners were not confused in understanding the different proxy access proposals on which they were asked to cast their votes. In no case did both proposals earn a majority vote. In all but one case, one proposal or the other got a clear majority vote, with a margin over the other proposal in excess of 5%. Even in the one very minor exception, Chipotle, the shareowner proposal got a near-majority of 49.86%, compared to management's 39.71%. Those seven Boards face no ambiguity or difficulty interpreting the voting results. Rather, in each case, they simply got clear and valuable information, typically available by no other means, as to what shareowners truly preferred.

⁵ Exelon Corporation. 2015 Proxy Statement. P 81.

http://www.sec.gov/Archives/edgar/data/1109357/000119312515098237/d876808ddef14a.htm#rom876808_17.

⁶ Visteon Corporation. 2015 Proxy Statement. P 52.

http://www.sec.gov/Archives/edgar/data/1111335/000119312515167831/d913720ddef14a.htm#toc913720_20.

Table 3: Votes Received by “Competing” Proxy Access Proposals To-Date in 2015⁷

Company	Board Proposal	Shareowner Proposal
The AES Corporation	36.17%	66.36%
Chipotle Mexican Grill	34.71%	49.86%
CloudPeak Energy	25.92%	71.12%
Exelon	52.58%	43.60%
Expeditors International of Washington	70.32%	35.03%
SBA Communications	51.65%	46.28%
Visteon Corporation	21.15%	75.67%

The prior interpretation of the Rule created a risk of “gamesmanship”

Chair White raised a pivotal point when questioning to what extent the Rule may result in, “unintended consequences and potential misuse of our process.”⁸ Evidence from the 2015 proxy season reveals that the Rule, as initially interpreted in the Staff’s *Whole Foods* no-action advice (Dec. 1, 2014), *withdrawn* (Jan. 16, 2015), creates a risk of gamesmanship by issuers.

Following *Whole Foods*, twenty-five additional companies (seventeen of which were responding to NYC Systems-sponsored proposals) quickly submitted requests for no-action relief under the Rule. Each request unequivocally represented that at its upcoming annual meeting, the company would be submitting for shareowner approval its own resolution to provide for proxy access. (See relevant excerpts in Appendix B.)

Despite those public promises to the SEC and to investors that each company would be presenting a proxy access proposal, 13 of the 25 companies failed to present any company-sponsored proposal on proxy access. Indeed, in their opposition statements to shareowner proxy access resolutions, 11 of those 13 companies opposed and argued *against* the entire concept of proxy access in any form. Those opposition statements variously described any form of proxy access as being “unnecessary, disruptive and potentially destabilizing,” “disruptive and harmful,” having “significant adverse consequences,” etc. (See Appendix C for a selection of excerpts from company proxy statements.)

The dramatic shift, from companies’ public representations to their regulator that their boards have “determined to submit” purported “conflicting proposals” on proxy access, to not submitting any such proposal, coupled with their subsequent broad opposition to the very concept of proxy access, highlights a serious risk from a broad interpretation of “conflicting proposals” under the Rule: companies, by claiming an intention to submit a competing proposal that they otherwise had no intention to submit, could game the Rule to prevent votes on shareowner proposals that might garner very substantial majorities. We agree with Chair White’s sentiment that gamesmanship should have no place in the process. That is particularly so when companies’ sole

⁷ For purposes of consistency, Table 3 tabulates all vote percentages as the percentage of “yes” votes divided by votes cast. Italicized results denote majority-supported resolutions.

⁸ Chair Mary Jo White. “A Few Observations on Shareholders in 2015.” Tulane University Law School 27th Annual Corporate Law Institute New Orleans, Louisiana. March 19, 2015. <http://www.sec.gov/news/speech/observations-on-shareholders-2015.html>.

aim may be to block shareowners from providing information to management about their preferences on a precatory proposal.

Beyond Access: The Rule’s Excessively Broad Impact Beyond Proxy Access

We note that the Division’s historic interpretation of the Rule has impacted proposals on topics other than proxy access. For example, the Division has permitted companies to exclude proposals addressing clawback provisions and change-in-control severance agreements for future equity plans and awards, in cases where the company has sought shareowner approval on an executive plan on that year’s proxy statement, even where no direct conflict exists.⁹ Using the same analysis as for proxy access, a board-sponsored equity plan proposal does not “directly conflict” with a precatory shareowner proposal that requests *prospective* policy reforms to be implemented in a way that does not conflict with existing contracts, equity plans, or agreements. If shareowners approve both proposals, a board could readily understand that shareowners agree with the broad equity plan provisions as presented on the proxy, but also agree that *future* plans should incorporate the recommendations of the shareowner proposal. For that reason, too, a narrow interpretation of the Rule is warranted.

Conclusion: Towards a Workable Interpretation

The results of the 2015 proxy season have provided an unprecedented “real world” experiment on the extent to which a narrow application of the Rule going forward would achieve a proper balance, by precluding binding proposals calling for opposite results, but otherwise allowing shareowners to inform management as to their preferences. We submit that the above evidence supports the proposal that two proposals addressing similar topics, in which at least one proposal is not binding, would not result in directly conflicting proposals, would not generate ambiguity or difficulty in interpreting the results, and – crucially – would foreclose the temptation of gamesmanship which appeared to be at play early in the 2015 proxy season. Such a revised interpretation is permissible under *Perez*, and would facilitate the use of private ordering on matters of shareowner concern such as proxy access.

We appreciate the Division’s consideration and would welcome the opportunity to discuss this further.

Sincerely,



Michael Garland

⁹ See *ConocoPhillips* (February 28, 2014), available at: <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2014/amalgamatedbankconoco022814-14a8.pdf>. See also *Boeing* (February 25, 2014), available at: <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2014/nycemployeesboeingnew022514-14a8.pdf>, reconsideration denied (March 14, 2014).

APPENDIX A: Vote Results on NYC Systems 2015 Proxy Access Proposals¹⁰

Company	2015 AGM	Shares For	Shares Against	Final Vote	Competing Proposal, Pre emptive By law, Other Notes
Apache Corp.	5/14/2015	290,383,343	22,799,745	92.72%	W/mgmt support
Republic Services	5/14/2015	258,439,973	29,041,192	89.90%	No board recommendation
Avon Products Inc.	5/6/2015	253,679,164	81,422,429	75.70%	
Visteon Corporation	6/11/2015	23,553,248	7,574,138	75.67%	21.15%
FirstEnergy Corp.	5/19/2015	226,599,452	90,710,293	71.41%	
Cloud Peak Energy Inc.	5/13/2015	32,254,575	13,095,864	71.12%	25.92%
Netflix, Inc.	6/9/2015	34,110,915	13,954,205	70.97%	
Hasbro Inc.	5/21/2015	70,669,231	32,315,904	68.62%	
Roper Technologies Inc.	5/29/2015	58,921,688	28,238,212	67.60%	
American Electric Power Co., Inc.	4/21/2015	220,571,175	107,900,329	67.15%	
Alpha Natural Resources, Inc.	5/21/2015	59,286,157	29,013,658	67.14%	
Nabors Industries Ltd.	6/2/2015	178,458,627	87,756,711	67.04%	
The AES Corporation	4/23/2015	411,136,143	208,374,419	66.36%	36.17%
EQT Corporation	4/15/2015	74,818,968	38,020,840	66.31%	
AvalonBay Communities Inc.	5/21/2015	73,485,204	39,628,900	64.97%	
Freeport-McMoRan Copper & Gold Inc.	6/10/2015	425,900,219	230,784,820	64.86%	
Duke Energy Corporation	5/7/2015	269,370,537	160,063,056	62.73%	
Marathon Oil Corporation	4/29/2015	321,394,551	191,118,775	62.71%	Enacted 5% bylaw (04/09/15)
Occidental Petroleum Corporation	5/1/2015	366,835,985	224,740,075	62.01%	
DTE Energy Company	5/7/2015	76,842,406	47,738,202	61.68%	
PPL Corporation	5/20/2015	299,445,495	188,042,670	61.43%	
Range Resources Corporation	5/19/2015	87,435,806	56,119,765	60.91%	
Anadarko Petroleum Corporation	5/12/2015	227,684,098	155,358,454	59.44%	
eBay Inc.	5/1/2015	544,459,733	371,585,696	59.44%	
Vertex Pharmaceuticals Incorporated	6/4/2015	126,418,279	89,918,865	58.44%	
Devon Energy Corporation	6/3/2015	164,798,024	118,618,598	58.15%	
Apartment Investment and Management Company	4/28/2015	74,776,090	54,847,692	57.69%	
CF Industries Holdings, Inc.	5/15/2015	20,943,385	15,575,541	57.35%	Enacted 5% bylaw (02/04/15)
Southwestern Energy Co.	5/19/2015	187,027,012	144,510,272	56.41%	
Cimarex Energy Co.	5/14/2015	42,120,311	32,835,128	56.19%	
Alliance Data Systems Corporation	6/3/2015	28,815,791	22,880,569	55.74%	
HCP, Inc.	4/30/2015	203,604,625	163,327,815	55.49%	Enacted 5% bylaw (02/08/15)
Chevron Corporation	5/27/2015	708,419,594	571,606,250	55.34%	
ConocoPhillips	5/12/2015	444,379,995	374,315,155	54.28%	
The Priceline Group Inc.	6/4/2015	23,288,596	20,103,340	53.67%	Enacted 5% bylaw (03/18/15)
Murphy Oil Corporation	5/13/2015	79,723,018	70,814,732	52.96%	
Hess Corporation	5/6/2015	119,517,383	114,398,657	51.09%	
EOG Resources, Inc.	4/30/2015	227,790,419	221,305,020	50.72%	Will enact 5% bylaw
Chipotle Mexican Grill, Inc.	5/13/2015	12,818,183	12,890,193	49.86%	34.71%
Exxon Mobil Corporation	5/27/2015	1,284,789,280	1,316,119,928	49.40%	
Pioneer Natural Resources Co.	5/20/2015	62,328,930	63,961,416	49.35%	Will enact 5% bylaw
Alexion Pharmaceuticals, Inc.	5/6/2015	87,188,567	89,946,367	49.22%	
Peabody Energy Corp.	5/4/2015	87,325,721	92,136,153	48.66%	
CONSOL Energy Inc.	5/6/2015	93,574,378	105,682,362	46.96%	
FleetCor Technologies, Inc.	6/10/2015	34,877,823	39,482,060	46.90%	
SBA Communications Corp.	5/21/2015	51,720,353	60,025,326	46.28%	51.65%
Southern Company	5/27/2015	260,446,276	303,750,942	46.16%	
VCA Inc.	4/16/2015	32,996,452	38,850,878	45.93%	
Cabot Oil & Gas Corporation	4/23/2015	160,149,721	193,704,930	45.26%	Enacted 5% bylaw (03/11/15)
New York Community Bancorp Inc.	6/3/2015	118,849,913	148,935,836	44.38%	Enacted 5% bylaw (03/17/15)
Exelon Corporation	4/28/2015	270,056,108	349,307,165	43.60%	52.58%
Level 3 Communications, Inc.	5/21/2015	127,494,852	164,923,459	43.60%	
Noble Energy, Inc.	4/28/2015	141,242,669	192,278,654	42.35%	
PACCAR Inc.	4/21/2015	126,433,775	174,847,968	41.97%	
NVR, Inc.	5/5/2015	1,533,810	2,161,770	41.50%	
Urban Outfitters Inc.	6/2/2015	47,743,389	69,758,730	40.63%	High inside ownership
Arch Coal Inc.	4/23/2015	36,747,909	64,548,909	36.28%	Enacted 5% bylaw (02/26/15)
Westmoreland Coal Co.	5/19/2015	4,888,986	8,765,664	35.80%	
Expeditors International of Washington Inc.	5/21/2015	53,626,528	99,456,162	35.03%	70.32%

¹⁰ Appendix A includes all NYC Systems-sponsored proxy access proposals voted during 2015 for which companies have disclosed vote results to the SEC in filings as of June 16, 2015.

APPENDIX B: Excerpts from Select No-Action Requests

The following excerpts are taken from letters companies sent to the Securities and Exchange Commission requesting no-action relief to exclude a precatory shareowner proposal requesting that the board implement proxy access. In each, the companies unequivocally state their intent to include a board-sponsored resolution to implement a proxy access provision at the company's 2015 annual meeting.

The Board *has determined to submit a proposal to stockholders at the 2015 Annual Meeting* with respect to proxy access for director nominations... (Alpha Natural Resources; emphasis added)¹¹

The Company believes that the Proposal may properly be excluded from the 2015 Proxy Materials pursuant to Rule 14a-8(i)(9) because the Proposal directly conflicts with a proposal *to be submitted by the Company in the 2015 Proxy Materials*.... The Board has determined to submit a proposal to the Company's stockholders at the 2015 Annual Meeting with respect to proxy access for director nominations (the "Company Proposal"). Specifically, the Board intends to seek stockholder approval of a proxy access framework that would permit stockholders...(Conoco Phillips; emphasis added)¹²

The Company respectfully requests that the Staff concur in the Company's view that the Proposal may be properly excluded from the Proxy Materials pursuant to Rule 14a-8(i)(9) because the Proposal directly conflicts with the Company's own proposal.... It is anticipated that the Corporate Governance Committee of the Board will recommend that the Board submit a proposal to shareholders at the 2015 Meeting with respect to proxy access for director nominations (the "Company Proposal"). ...The specific text of the proposed Regulations amendments implementing the Company Proposal *will be included in the Proxy Materials*... (FirstEnergy; emphasis added)¹³

Cimarex Energy Co. (the "Company") *intends to provide shareholders at its 2015 Annual Meeting of Shareholders (the "2015 Annual Meeting") with the opportunity to vote on a Company-sponsored (and Board-recommended) "proxy access" proposal* that would grant substantial, long-term shareholders with access rights to the Company's proxy statement and proxy card for eligible shareholder director nominations."... "The Company's Board *plans to submit a Company-sponsored proposal at the 2015 Annual Meeting* (the "Company Proposal") seeking shareholder approval of a proxy access framework..."....(Cimarex; emphasis added)¹⁴

The Company believes that the Proposal may properly be excluded from the 2015

¹¹ Alpha Natural Resources. No-action request letter. <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/nyccomptrollealpha020515-14a8.pdf>.

¹² Conoco Phillips. No-action request letter. <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/comptrollerofthecitynyconoco020515-14a8.pdf>.

¹³ FirstEnergy. No-action request letter. <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/nycremployeeretirementfirst020515-14a8.pdf>.

¹⁴ Cimarex. No-action request letter. <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/comptrollercityofnewyorkcimarex020514-14a8.pdf>.

Proxy Materials pursuant to Rule 14a-8(i)(9) because the Proposal directly conflicts with a proposal to be submitted by the Company in the 2015 Proxy Materials.... The Board **has determined to submit a proposal to the Company's stockholders at the 2015 Annual Meeting** with respect to proxy access for director nominations (the "Company Proposal"). Specifically, the Board intends to seek stockholder approval of a proxy access framework... (Peabody Energy; emphasis added)¹⁵

The Company believes that the Shareholder Proposal may properly be excluded from the 2015 Proxy Materials pursuant to Rule 14a-8(i)(9) because the Shareholder Proposal directly conflicts with a proposal **to be submitted by the Company in its 2015 Proxy Materials**... The Board has determined to submit a proposal to shareholders at the 2015 Annual Meeting with respect to proxy access for director nominations (the "Company Proposal"). Specifically, the Board intends to seek shareholder approval... (Noble Energy; emphasis added)¹⁶

¹⁵ Peabody Energy. No-action request letter. <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/comptrollercityofnewyorstate020415-14a8.pdf>.

¹⁶ Noble Energy. No-action request letter. <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/comptrollercitynewyorknoble020515-14a8.pdf>.

APPENDIX C: Excerpts from Company Proxies Opposing Proxy Access

The following is a non-exhaustive list of excerpts from companies that had initially disclosed their intent to include a board-sponsored proxy access resolution at their 2015 annual meetings in statements to the Securities and Exchange Commission, but subsequently opposed proxy access in any form in 2015 proxy materials.

Allowing stockholders to nominate competing candidates for director in our proxy statement would usurp the role of the independent nominating and corporate governance committee and our board in one of the most crucial elements of corporate governance, the selection and nomination of directors....***Implementation of a Proxy Access Bylaw Could Have a Number of Other Significant Adverse Consequences*** (Alpha Natural Resources, Inc.; emphases added)¹⁷

The Board recommends that you vote against this proposal because it ignores the effective voice stockholders already have, undercuts the critical role of the independent Committee on Directors' Affairs, and ***would introduce an unnecessary, disruptive and potentially destabilizing dynamic into the Board election process***. In short, the proposal advances a solution for a problem that does not exist at ConocoPhillips, and does so at the risk of considerable harm to our Company.... ***The Board believes that proxy access may have a number of significant adverse consequences and could harm our Company, Board and stockholders*** (Conoco Phillips; emphases added)¹⁸

We believe that, because of their unique positions, ***the independent Corporate Governance Committee and your Board are better situated than individual investors or special interests groups*** to assess the particular qualifications of potential director nominees and to determine whether they will contribute to an effective and well-rounded Board that operates openly and collaboratively and represents the interests of all shareholders and not just those with special interests....***Unfettered proxy access would bypass and undermine our carefully designed director nominating process by placing directly into nomination candidates*** who may fail to satisfy your Company's independence or other qualifications or who may fail to contribute the needed experiences and perspectives to the mix on your Board....***Your Board also believes that replacing our current process with proxy access could be disruptive and harmful to the operations of your Board*** and, as a result, our shareholders by unnecessarily shifting the responsibility and expense of soliciting proxies for shareholders with special interests or short-term interests from such shareholders to your Company. (FirstEnergy Corporation; emphases added)¹⁹

Allowing stockholders to use our proxy materials for contested director elections will not improve our corporate governance. Rather, ***proxy access could harm our Company***, our

¹⁷ Alpha Natural Resources, Inc. 2015 Annual Meeting Proxy.

<http://www.sec.gov/Archives/edgar/data/1301063/000119312515124338/d885726ddef14a.htm>.

¹⁸ ConocoPhillips Corporation. 2015 Annual Meeting proxy.

http://www.sec.gov/Archives/edgar/data/1163165/000110465915023250/a15-7428_1def14a.htm.

¹⁹ FirstEnergy Corporation. 2015 Annual Meeting Proxy.

<http://www.sec.gov/Archives/edgar/data/1031296/000119312515115212/d853082ddef14a.htm>.

Board and our stockholders... (Noble Energy, Inc.; emphasis added)²⁰

The Board recommends that you vote against the Proponent's proposal *because it ignores the effective voice shareholders already have and undercuts the critical role of, and protections afforded by, the independent Governance & Nominating Committee* of the Board. (Kohl's Corporation; emphasis added)²¹

²⁰ Noble Energy, Inc. 2015 Annual Meeting Proxy.
<http://www.sec.gov/Archives/edgar/data/72207/000007220715000018/nbl-2015proxydef.htm>.

²¹ Kohl's Corporation. 2015 Annual Meeting Proxy.
<http://www.sec.gov/Archives/edgar/data/885639/000119312515110272/d870201ddef14a.htm>.