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June 22, 2015

Keith F. Higgins
Director
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
Via E-Mail: i9review@sec.gov

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

Dear Mr. Higgins:

I am writing on behalf of Domini Social Investments LLC, an SEC-registered investment adviser and the manager of the Domini Social Equity Fund, an open-end mutual fund that has been an active proponent of shareholder proposals. The Fund, which now represents $1.1 billion, has submitted more than 250 shareholder proposals over the past twenty years on a broad range of social, environmental and governance issues. We view Rule 14a-8 as a critical governance tool that has enabled numerous constructive dialogues and policy changes and greatly value the opportunity to submit shareholder proposals as well as to vote on proposals submitted by other investors.

Thank you for the opportunity to comment on Staff's review of the application of Rule 14a-8(i)(9). We are concerned that a broad interpretation of the exclusion (and Staff's current interpretation, we believe, is already too broad) could transform this rarely used provision into the exception that swallows the rule. It is not difficult to foresee issuers challenging an expanding range of shareholder proposals on the grounds that they intend to offer a similar, "conflicting" proposal of their own, merely as a means to omit a shareholder proposal and limit shareholder choice. In our view, Staff should view (i)(9) challenges with some degree of skepticism, as good faith efforts to address an issue can frequently be worked out between management and proponents beforehand, obviating the need to consider (i)(9). There are, therefore, likely to be meaningful distinctions between these management and shareholder proposals that would present shareholders with the opportunity to send a clear message to the board. Staff should be reticent to limit such opportunities without a clear and direct conflict between the two proposals. For these reasons, we believe a narrow construction of (i)(9) is recommended. We note, below, that this narrow construction is entirely consistent with the original intent of the subsection, as described by a series of comment letters submitted by the issuer community.

We recommend that Staff issue a Staff Legal Bulletin containing the following elements, described in further detail below:

1. Conflicts under 14a-8(i)(9) should be limited to legal conflicts.
2. Non-binding shareholder proposals cannot conflict with binding proposals.
3. If Staff determines that there is, in fact, a legal conflict between a binding shareholder proposal and a management proposal, the proponent should be offered the opportunity to convert the

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proposal to a non-binding proposal, consistent with how Staff has treated other legal conflicts as described in Staff Legal Bulletin 14.

We do not believe a rulemaking is necessary or advisable to clarify subsection (i)(9).

The review of (i)(9) was prompted by a situation where corporate management was widely perceived to be engaged in a form of gamesmanship – offering a proxy access proposal that set the bar so high no shareholder could utilize the right, merely to fend off a shareholder proposal. As Chair White noted, "In impartially administering the rule, we must always consider whether our response would produce an unintended or unfair result. Gamesmanship has no place in the process."[1] We have learned from a series of letters submitted by the issuer community that the original intent of the rule was to eliminate a perceived form of gamesmanship *by shareholders* – the use of Rule 14a-8 to circumvent the solicitation rules. As discussed below, it is virtually impossible to utilize 14a-8 to offer counter proposals. The rule, however, has been applied where such abuses have not even been alleged. The issuer community is seeking an extremely broad and unreasonable reading of the subsection that would transform what was intended to be a rarely used prohibition of a very specific abuse of process into a trump card to be used by management any time they so choose.

Defining Conflicts as Inconsistent Mandates

You have suggested that the approach taken by the Staff under subsection (i)(9) has been to exclude proposals where inclusion could *"present alternative and conflicting decisions for shareholders"* and *"could provide inconsistent and ambiguous results."* The articulation of Staff's rationale has materially changed over time and, we believe, has strayed from the text and intent of the subsection. To the extent that this reflects the current view used by the Staff, we believe it is excessively broad, inconsistent with the text of the rule and not in the best interests of shareholders.

We believe the focus on "alternative" decisions for shareholders misreads the rule, which focuses on "conflicts," not choices. We do not believe that subsection (i)(9) was ever intended to prevent shareholders from considering clear and unambiguous alternatives.

The reference to "decisions for shareholders" and to "inconsistent and ambiguous results," is more problematic, however. Earlier iterations of this standard referenced the problem of an inconsistent and inconclusive "mandate" from shareholders. (See, e.g., ". . . a favorable shareholder vote on both management's and the proponent's proposal would result in an *inconsistent and inconclusive mandate* from the shareholders." *Pantepec Int'l, Inc.*(September, 1976) *(emphasis added)*).

This earlier formulation was closer to the mark. Staff's focus ought to be on whether the two proposals create a legal problem for the board – two inconsistent legal mandates – not on whether shareholders or directors might be faced with a difficult or confusing decision. Staff must therefore consider the legal implications of precatory proposals. Precatory proposals can never give rise to a "conflict." A majority vote in support of a non-binding shareholder proposal presents information to the board, but *does not create a legal mandate*. The board is free to ignore the precatory proposal. The fact that proxy advisory firms or other third parties may believe that a board should respond to a significant vote for a precatory proposal is immaterial. There will always be multiple demands made upon the board that Staff cannot possibly anticipate or mediate. The fact remains that there is a legal distinction between binding and non-

[1] http://www.sec.gov/news/speech/observations-on-shareholders-2015.html

binding proposals that Staff has failed to recognize in its application of (i)(9). **We therefore recommend that Staff issue guidance clarifying that Rule 14a-8(i)(9) refers to legal conflicts, and non-binding shareholder proposals cannot create a "conflict" for purposes of the rule.**

Staff should also be cognizant of the role of the board, and should not seek to supplant that role. Even where ambiguity is a possible outcome, the information is not necessarily unimportant or irrelevant. Ambiguous results can suggest to the board a degree of uncertainty with respect to its decision that may dictate changes or reconsideration. Resolution of any possible conflicts between a management proposal and a non-binding shareholder proposal are to be determined by the board of directors, presumably in consultation with shareholders. Any other result supplants the decision making process of the board by denying the board access to information about a more complete range of shareholder preferences on the matter at hand. This is one of the key benefits of the non-binding proposal – it can provide this kind of information to boards without dictating any actions. It is not the role of the Staff to determine, *ex ante*, that possibly ambiguous information should not be produced and should not be provided to the board for consideration. This interpretation does not protect shareholders but substitutes the decision of the Staff for the decision of the board. This is an inappropriate role for the Staff.

Indeed, the joint letter recently submitted by CalPERS and CalSTRS[2] makes a strong case that the presentation of alternative proxy access proposals has not, in fact, produced inconsistent or ambiguous results. As that letter noted, "shareowners clearly understood the intended impact of their votes, and companies were provided a clear and consistent view of their shareowners opinion, thanks to an explanation of the voting process provided by the companies." We also would note that the decisions of several companies this year to present both management and shareholder proxy access proposals on the same ballot demonstrates that doing so does not present any meaningful legal conflicts.

Precatory proposals can be used to take the temperature of shareholders on an issue and can provide a board with valuable information about shareholder preferences. These proposals, however, are merely advisory and cannot create anything in the nature of a legal conflict. We can conceive of no policy reason – or basis in the rule – to permit their exclusion simply because they present an alternative approach to a management proposal. To the contrary, in such situations they may provide particularly valuable information to the board.

We believe our recommended approach will eliminate confusion over Staff's standard of review, send a clear signal to both issuers and proponents, thereby reducing the volume of (i)(9) challenges, and allow shareholders to vote on alternative proposals to help inform the board's decision-making process. This should lead to better decision-making by the board.

The Process for Evaluating Direct Conflicts Between Binding Proposals

When evaluating two binding proposals that may be in direct conflict with each other, Staff should consider whether there are material differences between the management and shareholder proposal that would prevent the board from acting on both proposals. If the two proposals can co-exist, the shareholder proposal should be permitted.

In interpreting subsection (i)(9), Staff should also provide an opportunity to eliminate any direct conflict. This could include conversion of the proposal to a non-binding proposal. Staff currently permits

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[2] http://www.sec.gov/comments/i9review/i9review-4.pdf

proponents to modify their proposals under certain circumstances, including converting binding to non-binding proposals if the binding nature of the proposal creates a conflict with state law. Although SLB 14 recognizes that state law draws a distinction between binding and non-binding proposals, in our view, Staff's decision-making has not sufficiently recognized this important legal distinction. Staff also permits other modifications to address other types of legal conflicts.[3] This accommodation would eliminate the conflict while preserving the opportunity for shareholders to vote on the shareholder proposal, and thereby provide valuable input to the board.

We would also encourage Staff to deny relief under (i)(9) to any company that is unable to present the text of its proposal along with its no-action request.[4] Rule 14a-8(i)(j) and (k) ensure a fair process, where Staff and proponents are in a position to fully evaluate any no-action requests. It is not possible to fully evaluate an (i)(9) challenge without comparing the provisions of the two proposals, as recommended in the subsection's accompanying note. While an issuer may describe specific points of conflict, the proposal should be evaluated in its entirety to ensure that there are no undisclosed provisions that negate the disclosed provisions (for example, a hypothetical proxy access proposal providing an access right to shareholders that control 3% of shares could be negated by an undisclosed provision that requires a twenty year holding period). This would also help ensure that the board has approved the proposal.

The comment letter submitted on behalf of the New York City Comptroller's Office provides important data in this regard, noting that thirteen companies that submitted no-action requests pursuant to (i)(9) after the *Whole Foods* decision argued that they intended to present proxy access proposals, but then failed to do so. In fact, eleven of these companies used their statements in opposition to argue against the entire concept of proxy access.[5] Clearly, in these cases, there was no legitimate intent to present a proxy access proposal. These efforts at gamesmanship can be eliminated if Staff requires that companies include in their no-action requests a board-approved management proposal.

Considerations of "Confusion" and "Ambiguity" are Inconsistent with the Text of the Rule

Any approach that requires Staff to make assumptions about the possibility of shareholder "confusion" -- an irrelevant consideration not referenced in the rule itself -- can only lead to inconsistent decision-making. Shareholder "confusion" is most likely to be caused by substantially *similar* proposals, not by proposals that offer clearly distinct approaches to the same issue. In general, management and shareholder proponents should be able to reach agreement on substantially similar proposals. Staff, therefore, is generally only faced with no-action requests under (i)(9) when the two proposals are materially different, and *least likely* to cause any confusion because they present shareholders with a clear, unambiguous choice.

The language of the subsection itself contradicts Staff's use of "confusion" and "ambiguity." The rule addresses proposals that "directly conflict." <u>A *direct* conflict, by definition, is unambiguous</u>. The Rule, by

[3] Division of Corporation Finance: Staff Legal Bulletin No. 14 (July 13, 2001), available at https://www.sec.gov/interps/legal/cfslb14.htm

[4] For example, management proposals were not available to staff or proponents at the time of the initial no action request in *Whole Foods Market, Inc.* (December 1, 2014) or *Abercrombie & Fitch Co.* (May 2, 2005).

[5] Letter by Michael Garland on behalf of the New York City Comptroller's office (June 17, 2015), available at http://www.sec.gov/comments/i9review/i9review-7.pdf

its terms, addresses clear and "direct" conflicts. It does not appear to encompass subtle distinctions between proposals that may cause confusion and may, in fact, be able to coexist.

Whether or not shareholders may be confused by two proposals on the same topic, we would discourage the drastic remedy of exclusion to address this, which, in effect, denies choice to avoid confusion.

We would also suggest that much of the "confusion" that the issuer community claims stems from the presentation of two proposals on the same topic actually arises from management proposals that offer a right, such as proxy access, with one hand and withdraw it with the other – a right designed so that it could never be implemented. As Chair White put it, "What if management's proposal could be viewed as a proposal that, if adopted, may purport to provide shareholders with the ability to do something, such as call a special meeting or include a nominee for director in a company's proxy materials, but that, in fact, no shareholder would be able to meet the criteria to do so?"[6] Such a proposal may, indeed, present confusion to voters, and may incur opposition from investors, *with or without the inclusion of the shareholder proposal*. It remains management's prerogative to offer such proposals, but the confusion they create should not provide a basis for excluding a shareholder proposal on the same topic that presents a more sensible approach.

Although these types of management proposals may not offend subsection (i)(9), we would encourage Staff to remind issuers that it is their responsibility to ensure that the proxy statement does not contain any false or misleading statements. For example, issuers could be encouraged to use their statement in opposition to the shareholder proposal to explain the differences between the two proposals. Where the management proposal sets high thresholds, issuers should disclose the percentage of shareholders that are believed to meet that threshold. If a provision such as a holding period requirement or a requirement that only 'net long' holdings be eligible would effectively raise the threshold, this should be explained to shareholders. A management proposal labeled "proxy access" that includes provisions that make it practically impossible for any shareholder to use, should be deemed to be inherently misleading.

Rule 14a-8(i)(9) is not a "Subject Matter" Exclusion

The issuer community has offered several approaches to interpreting (i)(9) that are inconsistent with the intent of the rule – according to their own research – and with its plain terms.

For example, the Society of Corporate Secretaries argues that (i)(9) has consistently been applied to any shareholder proposal dealing with the same subject matter, "regardless of specific terms" of the proposals.[7] To the contrary, two proposals touching on the same topic may coexist without creating a conflict. The Society's overly broad reading of the provision would, in essence, eliminate the term "conflict" (it is certainly inconsistent with the more restrictive "directly conflicts") and open the door to a wide range of exclusions, simply because the two proposals touch on the same topic. The Society's proposal also appears to be inconsistent with the "Note to paragraph (i)(9)", included in the body of the rule, which states that: "A company's submission to the Commission under this section should specify the points of conflict with the company's proposal." This note suggests that the issuer will need to provide a clause-by-clause analysis of the two proposals and that this should form the basis of Staff's

[6] http://www.sec.gov/news/speech/observations-on-shareholders-2015.html
[7] Letter from Darla Stuckey on behalf of the Society of Corporate Secretaries and Governance Professionals, available at: http://www.sec.gov/comments/i9review/i9review-3.pdf.

determination. The note clearly anticipates that there may be *multiple* points of conflict to evaluate, meaning that the mere subject matter of the proposal cannot be determinative.

A rule permitting the exclusion of proposals touching on the same subject matter as a management proposal could easily have been written, but that would be a different rule. Rule 14a-8(i)(11), for example, permits the exclusion of a shareholder proposal that "substantially duplicates" a previously submitted shareholder proposal. It seems reasonable to conclude that (i)(9) was not intended to cover similar or duplicative proposals on the same subject matter, or the language of (i)(11) would have been repeated, or that provision would have been extended to management proposals. By its terms, (i)(9) was intended to cover direct conflicts.[8]

There is an internal contradiction in the Society's recommendation, however. The Society recommends that subject matter should be determinative "regardless of the approach of the conflicting proposal", "to the extent that there is a conflict." This is circular reasoning that fails to illuminate what "conflict" means. It undermines the Society's recommendation, tacitly acknowledging that conflicting same-subject proposals are a subset of same-subject proposals. In other words, the Society has acknowledged that (i)(9) does not simply apply to proposals dealing with the same subject matter, regardless of the specific terms. It deals with conflicting proposals on the same subject matter.

Rule 14a-8(i)(9) was Intended to Address a Rare Procedural Abuse

Issuers are simultaneously arguing that (i)(9) was intended to address a very specific and rare abuse of process -- counter proposals by shareholders that circumvent the solicitation rules -- <u>and</u> that it should be interpreted broadly to encompass counter proposals *by management* regardless of whether there has been any abuse of process. We would submit that these two positions are, to quote a phrase, in direct conflict.

Although the original intent of the exclusion appears to be unclear, a consistent view has been presented by the issuer community in several comment letters: "to prevent shareholders from using Rule 14a-8 to mount proxy contests without complying with the rules relating to proxy contests."[9] Since 1967, according to the letter submitted by Gibson Dunn & Crutcher LLP *et al* (the "law firm letter"), "the SEC has neither made any substantive changes to the exclusion nor provided much in the way of substantive interpretive guidance."[10] The 1982 Release, the letter notes, referred to shareholder proposals that are "counter to a proposal submitted by the issuer at the meeting" as an "abuse" of the process.[11]

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[8] The Society refers to the Adopting Release and its reference to "subject matter" in explaining the intent behind (i)(9), arguing that "the deliberate use of 'subject matter' rather than, e.g., terms, conditions, particulars, details, etc., is important. If management is including a proposal (e.g., to declassify the board, adopt majority voting, approve an equity compensation plan, or implement proxy access for shareholders to nominate directors), any shareholder proposal dealing with the same subject matter should be excluded to the extent that there is a conflict between the management proposal and the shareholder proposal regardless of the approach of the conflicting proposal (e.g., reflecting opposite approaches to an issue)." There is no evidence that the use of the generic term "subject matter" was intended to be particularly significant, or anything other than a synonym for substance, details, etc.

[9] Letter submitted by Gibson Dunn & Crutcher LLP; Morrison & Foerster LLP Sidley Austin LLP; Skadden, Arps, Slate, Meagher & Flom LLP; and Wilmer Cutler Pickering Hale and Dorr LLP (June 10, 2015), available at <u>http://www.sec.gov/comments/i9review/i9review-5.pdf</u>

[10] The "directly conflicts" language added in 1998 was intended to reflect the Division's longstanding interpretation. Toward the end of the law firm letter, in summation, the intent of the rule is restated: "to ensure that shareholders are not presented with 'alternative and conflicting decisions' and that the inclusion of a shareholder proposal will not result in 'inconsistent and ambiguous results.'" The letter fails to acknowledge that these are inconsistent statements,

The original intent of the subsection and its successor formulations was therefore to prohibit solicitations in opposition to management proposals. If this is indeed the rationale behind the original prohibition on "counter proposals", then it is quite clear that the exemption was based on the *sequencing of proposals*, and was intended to be used *infrequently*. The law firm letter's assertion that the sequencing of the proposals "is not a consideration encompassed by the text of the rule" ignores its own assertions about the history of the rule, recounted above. The rule is grounded in a prohibition on counter proposals offered by shareholders, and a counter proposal must come second.

In addition to sequencing, public notice is also critical. In order to solicit votes in opposition to a management proposal, or to offer a "counter proposal", one must first have access to the management proposal, or at least know of its existence. Shareholder proposals, however, are required to be submitted not less than 120 days before proxy statements are printed, which generally contain the first public disclosure of the annual meeting agenda. Unless management has publicly announced its intention to submit a particular proposal to a vote before the proposal filing deadline—including the terms of that proposal—a shareholder proposal cannot be considered a solicitation "opposing a proposal supported by management." This is largely a hypothetical abuse of process that is generally not available to shareholders, except, perhaps, on very rare occasions (*Northern States Power Company* (July 25, 1995)(Shareholder proposal requesting that the board of directors require management to negotiate a more equitable merger agreement excludable as 'counter to a proposal to be submitted by management.') This subsection was presumably crafted to deal with those very rare occasions. So rare, in fact, that they were deemed to be an "abuse" of process.

In reality, the shareholder proposal either accidentally coincides with a management proposal on the same topic, or management responds to the shareholder proposal with a proposal of its own. Neither situation can be considered an "abuse" by shareholders, as suggested by the 1982 Release.

Issuers are asking Staff to interpret (i)(9) to permit the exclusion of shareholder proposals any time a counter proposal has been offered *by management*. If the basis for the exclusion is to avoid the abuse of process described above, then *the exclusion should not apply when the announcement of the management proposal follows the submission of the shareholder proposal*. In these cases, the shareholder is clearly not seeking to solicit votes in opposition to management, and, by definition, has not offered a "counter proposal." It would be more accurate to say that management is seeking to solicit votes in opposition to the shareholder proposal. We have not seen any rationale why that prerogative of management should trump shareholders' right to submit an otherwise valid proposal.

Not only does this reverse the intent of the subsection, as explained by the law firm letter, it eliminates the concept of a 'direct conflict' from the rule and converts what was intended to be a narrow exemption to deal with a rare abuse of process into a trump card to be used at management's discretion.

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and that Staff's interpretation of the exclusion has changed over time from a focus on conflicting "mandates" to confusion in the voting process. As discussed above, the latter standard does not appear to be grounded in the text or the original intent of the rule.

[11] The original classification of counter proposals as an "abuse" of process suggests that these situations were considered extreme and, presumably, rare. It supports the notion that the original intent was for (i)(9) to be a rarely used exclusion to deal with actions that fell outside the realm of acceptable behavior.

Why would a provision designed to prevent a very specific abuse of process (non-compliance with the solicitation rules) be applicable when there has been no such abuse? We've seen no meaningful response to this question. The Society of Corporate Secretaries questions the logic of what they are calling the "first to propose theory." As the Faegre Baker Daniels letter puts it, "Was the board's action 'in response to' the shareholder proposal? ... Why does it matter?" It matters, because these scenarios undercut the very rationale these letters offer for the exclusion. Again, it is difficult to see how one can simultaneously argue that 1) the subsection was crafted to deal with a very specific abuse of process and 2) the subsection should be available to management any time they receive a controversial shareholder proposal – in essence, a trump card. They are arguing that the exemption is both very narrow and very broad at the same time.

The argument that this "first to propose" analysis presents insurmountable practical obstacles to Staff, requiring Staff to engage in mind-reading, is similarly without basis. To determine whether a shareholder counter proposal is being offered, it is only necessary to determine when the management proposal was publicly announced.

Rule 14a-8(i)(9) Should Not be Invoked to Raise Support for Management Proposals

Issuers are also asking Staff to exclude proposals, in effect, *because they may present more favorable terms than management proposals*. This is a very curious request. They are essentially asking Staff to consider the possibility that shareholders may express strong support for the shareholder proposal, and exclude it *on that basis*, because a strong vote for the shareholder proposal will either raise opposition to management from proxy advisory firms or because it may diminish votes for the less favored management proposal. This argument is presented in the context of avoiding "confusion", but confusion is not at issue here.

The law firm letter and the Business Roundtable, for example, cited an example from this proxy season where BorgWarner's management-sponsored special meeting proposal received more votes than a shareholder proposal on the same topic, but failed to pass.[12] The implicit suggestion here is that, in the absence of the shareholder proposal, additional shareholders would have voted for the management proposal. The shareholder proposal, in other words, did not cause confusion or present any legal conflicts, it presented a preferable option favored by a strong percentage of shareholders (a 20% threshold, as opposed to a 25% threshold to call a special meeting[13]). Had the shareholder proposal been excluded, some additional shareholders may have voted for the management proposal, but, given a choice, it is clear that these shareholders preferred the shareholder sponsored proposal with a lower threshold. Is the purpose of (i)(9) to ensure that shareholders have fewer choices so that management can pass its own proposals? The issuer community has argued that this is not its purpose -- its purpose was to avoid abuses of the solicitation rules. No such abuse is alleged here.

The BorgWarner proxy statement contains a clear solution to the problem, which relies upon the legal distinction between binding and precatory proposals:

> "If both Proposal 6 [the management proposal] and Proposal 7 [the shareholder proposal] are approved, the Company will implement Proposal 6 and not act on Proposal 7. The Company will

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[12] See, also, http://www.sec.gov/comments/i9review/i9review-5.pdf, at fn. 19.

[13] The management proposal also required that shares be held 'net long' for at least one year to qualify, which would effectively raise the threshold.

> consider approval of Proposal 6 as supporting the implementation of Proposal 6 even if Proposal 7 is approved. The Company believes that this approach is appropriate because approval of Proposal 6 requires a supermajority vote of stockholders and is necessary to amend the Certificate under Delaware law. In contrast, approval of Proposal 7 is advisory and non-binding on the board."[14]

In other words, there is no issue here, and certainly no confusion, except the fact that BorgWarner could not get sufficient support for its proposal, which may have been true even if the shareholder proposal had been excluded. Management now has the terms of the shareholder proposal to draw from to modify its special meeting requirements if it so chooses, and to accommodate the desires of shareholders. It now should have a better sense of shareholder preferences than if the shareholder proposal had been excluded. This seems to be a far more efficient and democratic process than eliminating shareholder choice.

The arguments outlined in these letters also ignore the different position of shareholders and managers under Rule 14a-8. The exclusions go only one way. The company has the capacity to strategically eliminate a shareholder proposal by presenting a conflicting alternative under (i)(9). Shareholders have no similar rights. Thus, where shareholders knowingly or unknowingly provide an alternative to management, they do not deprive shareholders of a right to vote on the company's proposal. This is a far cry from strategic use of the exclusion to deprive shareholders of the opportunity to vote on different approaches to the same issue, and to deprive the board of this potentially valuable information.

Conclusion

It has been argued that a narrow construction of (i)(9) would stifle management-shareholder dialogue and discourage issuers from addressing shareholder concerns by submitting their own proposals to a vote. To the contrary, nothing stifles dialogue faster than an automatic exclusion, particularly exclusions that are subject-matter based. If Staff pays no attention to the substance of the two proposals, there is little incentive for management to do so. A pure subject matter based exclusion discourages engagement on the specific terms of the proposals and encourages management to jump the gun and submit proposals merely to stifle shareholder debate on controversial issues. It is both counter-intuitive and counter-factual to assert that the exclusion of shareholder proposals promotes constructive dialogue.

It has also been suggested that exclusions under (i)(9) further the intent of Rule 14a-8 by preserving the opportunity for shareholders to vote on the issue, because shareholders are free to vote against the management proposal if they so choose. Rule 14a-8, however, permits shareholders to present issues on the proxy statement in their own words. A construction of the rule that equates this right to "voting against management's proposal" would be a negation of the rule.[15] A broad interpretation of (i)(9) could transform this rarely used provision into the exception that swallows the rule.

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[14] http://www.borgwarner.com/en/Investors/investortoolbox/2015%20Proxy%20FINAL%20PDF%20Book%20Proof-03182-15.pdf at 48.

[15] There may be rare cases where the management and shareholder proposals essentially negate each other – a vote for one is a vote against the other. In such cases, shareholders arguably have the opportunity to express their views simply by opposing the management proposal. But it is difficult to conceive of such a case, and if two such proposals were allowed to proceed to a vote, they would presumably provide clear guidance to the board because they represent a clear choice -- no informed voter would support both. The Society of Corporate Secretaries, by favoring a "subject matter" exclusion, however, is counseling Staff to exclude a much wider range of shareholder proposals than these true directly conflicting proposals.

In your speech to the PLI, you noted that assessing bad faith "could be a perilous task." We agree.[16] Establishing a clear, bright line approach to (i)(9) as we recommend, consistent with the wording of the subsection, would dramatically reduce the opportunity for gamesmanship and avoid the need for Staff to delve into those perilous waters. Our recommended approach, first suggested by the Council of Institutional Investors and endorsed by CalPERS and CalSTRS – non-binding proposals cannot "conflict" with management proposals – would satisfy issuers' and proponents' need for clarity and would eliminate any meaningful legal conflicts that "conflicting" proposals may create. Our proposal to permit conflicting binding proposals to be re-characterized as non-binding proposals would eliminate the need for any investigation into issuer or shareholder motives, while preserving both shareholder democracy and management's right to submit alternative proposals to a vote.

Thank you again for the opportunity to comment on this review. I can be reached at [redacted] if any further information would be helpful.

Sincerely,

Adam Kanzer
Managing Director

[16] It is not necessary or advisable for Staff to seek to ascertain the true intentions of management. The letters submitted by the issuer community imply the need to assess the intentions of *proponents*. They suggest that proponents are committing an "abuse" of process. Abuses of process can only be committed intentionally. It is therefore not management's state of mind that is at issue here, but the proponent's. If the proponent had no way of knowing that management intended to submit a proposal on the same topic, then there has been no abuse of process.