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July 22, 2016

VIA E-MAIL

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

Re: *Microsoft Corporation*
*Shareholder Submission of Kenneth Steiner*
*Securities Exchange Act of 1934 ("Exchange Act")—Rule 14a-8*

Ladies and Gentlemen:

This letter is to inform you that our client, Microsoft Corporation (the "Company"), intends to omit from its proxy statement and form of proxy for its 2016 Annual Shareholders Meeting (collectively, the "2016 Proxy Materials") a purported shareholder proposal (the "Submission") and statements in support thereof (the "Supporting Statement") received from Kenneth Steiner (the "Shareholder").

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

- filed this letter with the Securities and Exchange Commission (the "Commission") no later than eighty (80) calendar days before the Company's deadline for filing its definitive 2016 Proxy Materials with the Commission; and

- concurrently sent copies of this correspondence to the Shareholder's representative.

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

## THE SUBMISSION

The Submission requests that the Company's Board of Directors (the "Board") "shall not take any action whose primary purpose is to prevent the effectiveness of shareholder vote[s] without a compelling justification for such action." A copy of the Submission, as well as related correspondence with the Shareholder's representative, is attached as Exhibit A.

## BASES FOR EXCLUSION

We respectfully request that the Staff concur in our view that the Submission may be excluded from the Company's 2016 Proxy Materials pursuant to Rule 14a-8(a) because the Submission is not a proposal for purposes of Rule 14a-8. In the alternative, we believe the Submission may be excluded under Rule 14a-8(i)(3) because it is impermissibly vague and indefinite and is false and misleading, and under Rule 14a-8(i)(7) because the Submission deals with matters related to the Company's ordinary business operations.

## ANALYSIS

### I. The Submission May Be Excluded Under Rule 14a-8(a) Because It Is Not A Proposal.

The Submission is not a proposal for purposes of Rule 14a-8 because it does not present a proposal for shareholder action but instead seeks to provide a mechanism for shareholders to express their views on a specified topic. Under the Commission's rules, Staff responses to no-action requests under Rule 14a-8(a) and other Staff precedent, such a vote is not a proper subject under Rule 14a-8.

The rulemaking history of Rule 14a-8 clearly demonstrates that a shareholder proposal must specifically request a company to take an action in order for such proposal to be deemed appropriate for inclusion in a company's proxy materials. Rule 14a-8(a) states in relevant part:

> Question 1: What is a proposal? A shareholder proposal is your recommendation or requirement that the company and/or its board of directors *take action*, which you intend to present at a meeting of the company's shareholders . . . .

Rule 14a-8(a) (*emphasis added*).

Rule 14a-8(a) was adopted as part of the 1998 amendments to the proxy rules. In the Commission's 1997 release proposing these amendments, the Commission noted:

> The answer to Question 1 of revised rule 14a-8 would define a "proposal" as a request that the company or its board of directors take an action. *The definition reflects our belief that a proposal that seeks no specific action, but merely purports to express shareholders' views, is inconsistent with the purposes of rule 14a-8 and may be excluded from companies' proxy materials.* The Division, for instance, declined to concur in the exclusion of a "proposal" that shareholders express their dissatisfaction with the company's earlier endorsement of a specific legislative initiative. Under the proposed rule, the Division would reach the opposite result, because the proposal did not request that the company take an action.

Proposing Release, *Amendments to Rules on Shareholder Proposals*, Exchange Act Release No. 39093 (Sept. 18, 1997) (*emphasis added*) (*citations omitted*) (the "1997 Release").

Following adoption of Rule 14a-8(a), the Staff has confirmed that a shareholder submission is excludable if it "merely purports to express shareholders' views" on a subject matter. For example, in *Longs Drug Stores Corp.* (avail. Jan. 23, 2008), the Staff concurred that a submission in which a shareholder sought to include a letter expressing displeasure with the company's management policies in the company's proxy materials could be omitted under Rule 14a-8(a) because it did not recommend or require any action by the company or its board of directors. There, the proponent set forth a series of criticisms of the company's "hours, benefits, discounts, and morale" instead of presenting "a request that the company or its board of directors take an action." *See* the 1997 Release. The supporting statement accompanying the proponent's submission underscored her intent to disseminate critiques of the company, stating, for example, "I ask that this letter from but one worker be put in the Long's [*sic*] shareholder meeting notice because there is clearly a problem with upper management at Longs of which most shareholders may be unaware." *See also Sensar Corp.* (avail. Apr. 23, 2001) (concurring that a submission seeking to allow a shareholder vote to express shareholder displeasure over the terms of certain stock option grants could be omitted because it did not recommend or require any action by the company or its board of directors); *CSX Corp.* (avail. Feb. 1, 1999) (concurring that a submission was excludable under Rule 14a-8(a) where a shareholder submitted three poems for consideration but did not recommend or require any action by the company or its board of directors).

The Submission is exactly of the type addressed by the Commission in the 1997 Release and is parallel to the submissions in *Longs Drug Stores* and *Sensar*: it merely provides shareholders an opportunity to express their view on a principle without requesting the Company to take a specific action. The Supporting Statement clearly demonstrates that this is the Shareholder's objective, stating, "In effect, this proposal *[sic]* allows shareholders to formally endorse the same basic principle of shareholder democracy that our nation's most respected

business court already enforces." Thus, based on the clear language of Rule 14a-8(a), the precedents cited above, and the Supporting Statement's own description of the goal and effect of the Submission, the Submission is not a proper proposal under Rule 14a-8 and may be excluded from the Company's 2016 Proxy Materials.

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

*A. The Submission Is Materially Vague In Its Resolution.*

Rule 14a-8(i)(3) permits the exclusion of a shareholder proposal if the proposal or supporting statement is contrary to any of the Commission's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. The Staff consistently has taken the position that a shareholder proposal is excludable under Rule 14a-8(i)(3) as vague and indefinite if "neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires." Staff Legal Bulletin No. 14B (Sept. 15, 2004) ("SLB 14B"); *see also Dyer v. SEC*, 287 F.2d 773, 781 (8th Cir. 1961) ("[I]t appears to us that the proposal, as drafted and submitted to the company, is so vague and indefinite as to make it impossible for either the board of directors or the stockholders at large to comprehend precisely what the proposal would entail."); *Capital One Financial Corp.* (avail. Feb. 7, 2003) (concurring with the exclusion of a proposal under Rule 14a-8(i)(3) where the company argued that its shareholders "would not know with any certainty what they are voting either for or against"); *Fuqua Industries, Inc.* (avail. Mar. 12, 1991) (concurring with exclusion under Rule 14a-8(i)(3) where a company and its shareholders might interpret the proposal differently, such that "any action ultimately taken by the [c]ompany upon implementation [of the proposal] could be significantly different from the actions envisioned by shareholders voting on the proposal").

The Staff has on numerous occasions concurred in the exclusion of shareholder proposals under Rule 14a-8(i)(3) where key terms used in the proposal were so inherently vague and indefinite that shareholders voting on the proposal would be unable to ascertain with reasonable certainty what actions or policies the company should undertake if the proposal were enacted. For example, in *Puget Energy, Inc.* (avail. Mar. 7, 2002), the proponent submitted a proposal requesting the company's board of directors to "take the necessary steps to implement a policy of improved corporate governance" without identifying any specific action that could be taken to implement the proposal. In the supporting statement, the proponent then cited numerous examples of good corporate governance practices but did not make any company-specific recommendations, reaching a vague conclusion that "[p]ositive corporate governance would

increase the professionalism of the board of directors and add value to the company that will flow through to shareholders." The Staff thus concurred in Puget Energy's assertion that the proposal was too vague for shareholders to understand how the company would be impacted if they ratified the proposal. *See also AT&T Inc.* (avail. Feb. 21, 2014) (concurring in the exclusion of a proposal requesting that the board review the company's policies and procedures relating to the "directors' moral, ethical and legal fiduciary duties and opportunities," where the phrase "moral, ethical and legal fiduciary" was not defined or meaningfully described); *Moody's Corp.* (avail. Feb. 10, 2014) (concurring in the exclusion of a proposal requesting that the board report on its assessment of the feasibility and relevance of incorporating ESG risk assessments into the company's credit rating methodologies, where the proposal did not define "ESG risk assessments").

In the same manner, both the Submission's failure to ask the board or Company to take any action, and the lack of clarity as to the nature and scope of the Submission's request, are comparable to the *Puget Energy* proposal. The resolution clause of the Submission requests that the Board refrain from taking "any action whose primary purpose is to prevent the effectiveness of shareholder vote[s] without a compelling justification for such action." This request provides no guidance, however, to aid shareholders in determining what conduct would or would not implement the Submission. As with *Puget Energy's* general reference to "improved corporate governance," the Submission simply makes a general reference to "not preventing the effectiveness of a shareholder vote." The text of the Supporting Statement does not clarify the Submission's ambiguity. Similar to the supporting statement reviewed in *Puget Energy*, which contained a general discussion of corporate governance practices, the Supporting Statement here discusses an example of a corporate governance practice of "some boards of directors" without explaining whether or how that discussion relates to the Company's current practices or to the future implementation of the Submission. Specifically, the Supporting Statement criticizes the use of advance notice bylaws as "undermin[ing] the shareholder franchise," but does not address whether the Company has implemented such a bylaw or identify what actions the Company should take in light of this criticism. Indeed, the Submission does not request that the board take any action with respect to its existing articles of incorporation, bylaws or corporate governance policies or practices.

As well, the scope of the Submission's reference to "not tak[ing] any action whose primary purpose is to prevent the effectiveness of shareholder vote without a compelling justification" is vague and indefinite, as neither the Company nor its shareholders can determine what types of conduct the Submission may be addressed to. For example, the Supporting Statement refers to the adoption of advance notice bylaws as an example of an action that "undermine[s] the shareholder franchise." But it is unclear whether the adoption of advance notice bylaws is an action that "prevent[s] the effectiveness of shareholder vote without a

compelling justification." The Supporting Statement in fact acknowledges that advance notice bylaws serve a legitimate purpose, which is to institute a director nomination and proposal filing process that will "allow a company to fully inform shareholders who cannot attend the meeting about all matters that will be presented for a vote," but paradoxically references "complex advance notice bylaws that require a shareholder seeking to nominate directors or present proposals to fill out long forms and provide proprietary information to the board" and asserts that "such requirements have nothing to do with the legitimate purpose of an advance notice bylaw." Thus, as in *Puget Energy*, the Supporting Statement gives no guidance as to the scope of what the Proposal seeks to address.

There are in fact a wide range of actions that could be viewed as potentially affecting the "effectiveness of shareholder vote," and thus that would be subject to the Submission's "compelling justification" test. For example, comparable to the example of adopting an advance notice requirement, actions that could be viewed as impacting "the effectiveness of shareholder vote" include establishing the voting record date for a shareholder meeting, selecting the date, time and location for a shareholder meeting, determining whether telephonic or electronic submission of proxies will be available for shareholders, establishing admittance procedures for a shareholder meeting, and determining when to close the polls for voting at a shareholder meeting. As in *Puget Energy*, the Submission concludes vaguely that the Company's shareholders will benefit if the Submission is ratified (stating that the Shareholder "believe[s] the board will be more respectful of the shareholder franchise"), but fails to enumerate specific recommendations addressing that objective and a concrete plan for achieving them. Thus, the Submission is so vague that "neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires." *SLB 14B*. *See also Gannett Co., Inc.* (avail. Feb. 24, 1998) (concurring in the exclusion of a proposal because it was "unclear what action the [c]ompany would take if the proposal were adopted."); *A.H. Belo Corp.* (avail. Jan. 29, 1998) (concurring in the exclusion of a proposal because "neither the shareholders voting on the proposal, nor the [c]ompany, would be able to determine with reasonable certainty what measures the [c]ompany would take if the proposal was approved.").

In light of the foregoing, the Submission is vague and indefinite as to the details and scope of the requested Board actions. Thus, the Submission is excludable under Rule 14a-8(i)(3) because "implementation of [it] could be significantly different from the actions envisioned by the shareholders voting on [it]." *Fuqua Industries, Inc.* (avail. Mar. 12, 1991).

*B. The Submission Contains Misleading Factual Statements In Its Supporting Statement.*

The Staff consistently has allowed the exclusion under Rule 14a-8(i)(3) of entire shareholder proposals that contain statements that are false or misleading. *See, e.g.*, *Ferro Corp.* (avail. Mar. 17, 2015) (concurring in the exclusion of a proposal requesting that the company reincorporate in Delaware based on misstatements of Ohio law, which improperly suggested that the shareholders would have increased rights if the Delaware law governed the company instead of Ohio law); *General Electric Co.* (avail. Jan. 6, 2009) (concurring in the exclusion of a proposal under which any director who received more than 25% in "withheld" votes would not be permitted to serve on any key board committee for two years because the company did not typically allow shareholders to withhold votes in director elections); *Johnson & Johnson* (avail. Jan. 31, 2007) (concurring in the exclusion of a proposal to provide shareholders a "vote on an advisory management resolution . . . to approve the Compensation Committee [R]eport" because the proposal would create the false implication that shareholders would receive a vote on executive compensation); *State Street Corp.* (avail. Mar. 1, 2005) (concurring in the exclusion of a proposal requesting shareholder action pursuant to a section of state law that had been recodified and was thus no longer applicable); *General Magic, Inc.* (avail. May 1, 2000) (concurring in the exclusion of a proposal requesting that the company make "no more false statements" to its shareholders because the proposal created the false impression that the company tolerated dishonest behavior by its employees when in fact the company had corporate policies to the contrary). "[W]hen a proposal and supporting statement will require detailed and extensive editing in order to bring them into compliance with the proxy rules, [the Staff] may find it appropriate for companies to exclude the entire proposal, supporting statement, or both, as materially false or misleading." Staff Legal Bulletin No. 14 (July 13, 2001) ("SLB 14").

In evaluating whether a proposal may be excluded under Rule 14a-8(i)(3), the Staff has stated that it "consider[s] only the information contained in the proposal and supporting statement and determine[s] whether, based on that information, shareholders and the company can determine what actions the proposal seeks." Staff Legal Bulletin No. 14G (Oct. 16, 2012). Here, the Submission contains numerous false and misleading statements that are integral to the Submission's central concept of endorsing a principle that would apply to future actions by the Company's board.

First, the Supporting Statement contains materially misleading statements regarding the applicable state law governing the Company. By discussing two Delaware Chancery Court opinions on the duties of companies to protect shareholders' voting rights, the Supporting Statement suggests that the Company is governed by Delaware law. However, the Company is a Washington corporation, and the cited standards of Delaware corporate law—that a company

"must be held to the highest standards in providing for and conducting corporate elections," and that "the board bears the heavy burden of demonstrating a compelling justification" for actions whose primary purpose is to impede shareholders' exercise of voting rights—have not been endorsed under the Washington Business Corporation Act. In fact, in researching the issue, we were not able to find any court applying the Washington Business Corporate Act that cited *Blasius Indus., Inc. v. Atlas Corp.,* 564 A.2d 651 (Del. Ch. 1988). As stated by one law firm:

> Washington is not a "Delaware state" and the Washington courts have never in fact demonstrated a tendency to refer to or rely on Delaware corporate law. The myth that such a "pattern" exists is dangerous. Delaware law is unique and specialized, and cannot be readily or effectively superimposed on the divergent case law or statutory schemes of other states. That is certainly true in Washington, where our WBCA [Washington Business Corporation Act] is based on the national MBCA [Model Business Corporation Act] and owes almost nothing to Delaware's corporate statute or case law. Consequently, looking to Delaware law for guidance in counseling Washington corporations may lead lawyers to provide the wrong advice.
>
> Brian D. Buckley, *Debunking the Myth that Washington Follows Delaware on Issues of Corporate Law*, Fenwick & West LLP (Aug. 22, 2012), *available at* https://www.fenwick.com/publications/pages/debunking-the-myth-that-washington-follows-delaware-on-issues-of-corporate-law.aspx.

In requesting that the Company's board apply a Delaware legal standard to future actions, it is essential that the Submission accurately convey the legal standards governing the Company; presently, the Submission's central premise that a Delaware law standard should be "formally endorse[d]" is impermissibly misleading because it implies that the Company is governed by Delaware law.

Even if Delaware law did apply to the Company, the Supporting Statement is materially misleading because it misstates important principles of Delaware corporate law. The Supporting Statement's lead-in language contains a blanket assertion that all "actions that have an adverse impact on the right of shareholders to vote are *presumptively* invalid" (emphasis added). This misstates Delaware law, which only applies heightened scrutiny to corporate actions taken "for the *primary purpose* of interfering with the effectiveness of a stockholder vote." *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988) (emphasis added). Only with respect to this subset of actions does "the board bear[] the heavy burden of demonstrating a compelling justification for such action." *Id.* at 661. Although the Supporting Statement quotes *Blasius*, it does not do so in a way that corrects the misstatements elsewhere in the Supporting Statement. Likewise, the Supporting Statement offers misplaced criticism of advance notice bylaws that

impose filing requirements on shareholders, characterizing them as deterrents that are wholly unrelated to the supposed purpose of advance notice bylaws, which is "*simply* to allow a company to fully inform shareholders who cannot attend the meeting about all matters" to be voted on at the meeting (emphasis added). Contrary to this statement, Delaware law recognizes that advance notice bylaws serve a broader purpose, as they "are designed and function to permit orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations." *Openwave Sys. Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 239 (Del. Ch. 2007). Delaware courts thus will uphold advance notice bylaws unless they "unduly restrict the stockholder franchise or are applied inequitably." *Id*. Therefore, the Submission is impermissibly misleading because it misstates a company's obligations under Delaware law, particularly with respect to implementing advance notice bylaws.

In addition, the Supporting Statement is materially misleading because it makes an unfounded and inaccurate suggestion that the Company has been deficient in protecting shareholder voting rights. The closing sentence of the Supporting Statement urges that the Submission, if implemented, will cause the Board "to be more respectful of the shareholder franchise and cautious about taking any action that adversely impacts it." As with the proposal in *General Magic*, this assertion implies that Company action or inaction has negatively affected the shareholder voting process and that remedial efforts are necessary. However, nothing in the Submission or Supporting Statement identifies any specific action that the board has taken or proposes to take that the Submission would affect. Thus, by making broad misstatements of the law, criticizing actions of "some boards" in the abstract, and asserting that a vote for the Submission will make the board "more respectful of the shareholder franchise," the Submission falsely and misleadingly impugns the Company's board and implies that it has acted or is about to act unlawfully and inappropriately.

The materiality under Rule 14a-8(i)(3) of false and misleading assertions regarding corporate governance matters is demonstrated by the court's holding in *Express Scripts Holding Co. v. Chevedden*, 2014 WL 631538, at *4 (E.D. Mo. Feb. 18, 2014). There, in the context of a proposal that sought to separate the positions of chief executive officer and chairman, the court held that, "when viewed in the context of soliciting votes in favor of a proposed corporate governance measure, statements in the proxy materials regarding the company's existing corporate governance practices are important to the stockholder's decision whether to vote in favor of the proposed measure" and therefore are material. Applying *Express Scripts* to the Submission demonstrates that the false and misleading statements in the Submission and its Supporting Statement would be material to shareholders' consideration of the Submission. As explained above, the Supporting Statement implies that the Company is governed by Delaware law, that the board has acted in a manner that prevented the effectiveness of shareholder votes,

and that a vote for the Submission would merely "endorse" a principle that the Submission suggests already applies to the board. Just as the excludable proposals in *General Electric*, *Johnson & Johnson*, *State Street* and *General Magic* created false impressions that would impermissibly mislead shareholders considering the proposals, these materially false or misleading statements and implications make the Submission and the Supporting Statement so fundamentally misleading that it would "require detailed and extensive editing in order to bring [the Proposal and Supporting Statement] into compliance with the proxy rules." SLB 14.

## III. The Submission May Be Excluded Under Rule 14a-8(i)(7) Because It Deals With Matters Related To The Company's Ordinary Business Operations.

Rule 14a-8(i)(7) permits the Company to omit from its proxy materials a shareholder proposal that relates to its "ordinary business operations." According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the term "ordinary business" refers to matters that are not necessarily "ordinary" in the common meaning of the word, but instead the term "is rooted in the corporate law concept of providing management with flexibility in directing certain core matters involving the company's business and operations." Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release").

In the 1998 Release, the Commission explained that the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting," and identified two central considerations that underlie this policy. As relevant here, one of these considerations is that certain tasks "are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." The mere fact that a proposal could touch upon a significant policy issue is not sufficient to avoid the application of Rule 14a-8(i)(7) when a proposal sufficiently implicates ordinary business matters. Although the Commission has stated that "proposals relating to such [ordinary business] matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable," the Staff has expressed the view that proposals relating to both ordinary business matters and significant social policy issues may be excluded in their entirety in reliance on Rule 14a-8(i)(7). 1998 Release.

Here, even if the Submission were viewed as a proposal, it does not focus upon a significant policy issue, but instead encompasses many aspects of the Company's interaction with its shareholders that implicate ordinary business considerations. As discussed above, just as the Supporting Statement deems the adoption of advance notice bylaws to be an action which impacts the shareholder franchise, a wide range of other ordinary corporate actions also could be

viewed as impacting "the effectiveness of [the] shareholder vote," such as establishing the voting record date for a shareholder meeting, selecting the date, time and location for a shareholder meeting, determining whether telephonic or electronic submission of proxies will be available for shareholders, establishing admittance procedures for a shareholder meeting, and determining when to close the polls for voting at a shareholder meeting. The Staff has long held that proposals seeking to oversee the conduct of a company's annual meeting may be omitted under Rule 14a-8(i)(7) as relating to a company's ordinary business. *Bank of America Corp.* (avail. Dec. 22, 2009) (concurring in the omission of a proposal recommending that all shareholders be entitled to attend and speak at all annual meetings and stating that "[p]roposals concerning the conduct of shareholder meetings generally are excludable under [R]ule 14a-8(i)(7)"). This general standard has been applied to proposals that relate to shareholder voting considerations. *Northeast Utilities Services Co.* (avail. Mar. 3, 2008) (concurring in the omission of a proposal requiring, among other things, that the company allow shareholder voting to be conducted by electronic means). Likewise, the Staff has concurred in the exclusion of proposals relating to the location, time or accessibility of an annual meeting, all of which could impact the ability of shareholders to vote at a shareholders meeting. *Con-way Inc.* (avail. Jan. 22, 2009) (concurring in the omission of a proposal requesting that the company use real-time webcast for its annual meetings); *Ford Motor Co.* (avail. Jan. 2, 2008) (concurring in omission of a proposal requiring that the company hold its annual meeting in the Dearborn, Michigan area); *Bank of America Corp.* (avail. Feb. 16, 2006) (concurring in the omission of a proposal requesting that all shareholders be entitled to attend and speak at all annual meetings). Thus, even if there could be board actions covered by the Submission that implicate significant policy issues, the Submission is not sufficiently focused on such matters, and instead encompasses a broad range of activities regarding the Company's interaction with its shareholders and conduct of its shareholder meetings that constitute ordinary business activities. Accordingly, the Submission properly is excludable under Rule 14a-8(i)(7).

**CONCLUSION**

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Company excludes the Submission from its 2016 Proxy Materials. We are of the view that the Submission is not a proposal because its purpose is to allow shareholders to express their views and does not require the Board to take any specific action. In the alternative, if the Submission is deemed a proposal, we believe it is excludable under Rule 14a-8(i)(3) because it is impermissibly vague and indefinite so as to be inherently misleading.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this

matter, please do not hesitate to call me at (202) 955-8671, or John Seethoff, Vice President, Deputy General Counsel and Corporate Secretary, at (425) 705-5744.

Sincerely,

Ronald O. Mueller

Enclosure

cc: John Seethoff, Vice President, Deputy General Counsel and Corporate Secretary, Microsoft Corporation
John Chevedden
Kenneth Steiner

**EXHIBIT A**

Kenneth Steiner

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

Mr. Bradford L. Smith
Corporate Secretary
Microsoft Corporation (MSFT)
One Microsoft Way
Redmond WA 98052
Phone: 425 882-8080
Fax: 425 706-7329
Fax: 425 703-9117

Dear Mr. Smith,

I purchased stock in our company because I believed our company had greater potential. My attached Rule 14a-8 proposal is submitted in support of the long-term performance of our company. This Rule 14a-8 proposal is submitted as a low-cost method to improve compnay performance.

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

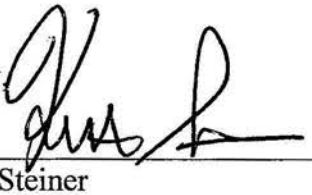
) at:

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

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

This letter does not cover proposals that are not rule 14a-8 proposals. This letter does not grant the power to vote. Your consideration and the consideration of the Board of Directors is appreciated in support of the long-term performance of our company. Please acknowledge receipt of my proposal promptly by email to ***FISMA & OMB Memorandum M-07-16***

Sincerely,



Kenneth Steiner

5-11-16

Date

cc: Peter A. Kraus <Peter.Kraus@microsoft.com>
Senior Attorney
FX: 425 706-7329
Peter A. Kraus <askboard@microsoft.com>
Board of Directors <askboard@microsoft.com>

*Resolved: "The board shall not take any action whose primary purpose is to prevent the effectiveness of shareholder vote without a compelling justification for such action."*

SUPPORTING STATEMENT

Almost thirty years ago, the Delaware Chancery Court ruled that actions that have an adverse impact on the right of shareholders to vote are presumptively invalid.

In *Aprahamian v. HBO & Co.*, 531 A.2d 1204, (Del. Ch. 1987), the Court said this:

> The corporate election process, if it is to have any validity, must be conducted with scrupulous fairness and without any advantage being conferred or denied to any candidate or slate of candidates. In the interests of corporate democracy, those in charge of the election machinery of a corporation must be held to the highest standards in providing for and conducting corporate elections.

Just one year later, in *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch., 1988), the Chancery Court made it clear that a board cannot rely solely on its business judgment if takes an action for the primary purpose of preventing the effectiveness of a shareholder vote. Rather, the board must have a compelling justification. The Court explained:

> The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests....Action designed principally to interfere with the effectiveness of a vote inevitably involves a conflict between the board and a shareholder majority....[I]n such a case, the board bears the heavy burden of demonstrating a compelling justification for such action.

Unfortunately, some boards of directors still do things that undermine the shareholder franchise. For example, many boards have adopted complex advance notice bylaws that require a shareholder seeking to nominate directors or present proposals to fill out long forms and provide proprietary information to the board. That deters shareholders from exercising their voting rights and has led to costly litigation. Moreover, such requirements have nothing to do with the legitimate purpose of an advance notice bylaw which is simply to allow a company to fully inform shareholders who cannot attend the meeting about all matters that will be presented for a vote.

In effect, this proposal allows shareholders to formally endorse the same basic principle of shareholder democracy that our nation's most respected business court already enforces. If this proposal is approved, we believe the board will be more respectful of the shareholder franchise and cautious about taking any action that adversely impacts it.

Microsoft Corporation
One Microsoft Way
Redmond, WA 98052-6399

Tel 425 882 8080
Fax 425 706 7329
www.microsoft.com

Microsoft

VIA OVERNIGHT MAIL

June 29, 2016

Mr. Kenneth Steiner

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

Dear Mr. Steiner,

Microsoft Corporation on June 20, 2016 received your proposal relating to shareholder voting for consideration at our 2016 Annual Shareholders Meeting (the "Proposal"). We would appreciate the opportunity to discuss this proposal with you.

The Proposal contains a procedural deficiency, which Securities and Exchange Commission ("SEC") regulations require us to bring to your attention within a specified period of time. Rule 14a-8(b) under the Securities Exchange Act of 1934, as amended, provides that shareholder proponents must submit sufficient proof of their continuous ownership of at least $2,000 in market value, or 1% of a company's shares entitled to vote on the proposal, for at least one year *as of the date the shareholder submits the proposal*. We received no proof of ownership with the proposal.

To remedy this defect, you must submit sufficient proof of your ownership of the requisite number of Microsoft shares *as of June 20, 2016*.

For your reference, I enclose copies of Rule 14a-8 and SEC Staff Legal Bulletin No. 14F ("SLB 14F"), which has further guidance on how to establish proof of ownership under Rule 14a-8. Please see SLB 14F for further details regarding the type of notice or notices that may be required.

Also please note that SLB 14F provides the following sample language to include in a proof of ownership letter that would satisfy the requirements of Rule 14a-8(b):

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

The SEC's rules require that your response be postmarked or transmitted electronically no later than 14 calendar days from the date you receive this letter. Please direct any response to me by mail, email or facsimile at

One Microsoft Way
Redmond, WA 98052
Attn: Peter A. Kraus, 34/4616
Email peter.kraus@microsoft.com
Facsimile (425) 703-9117

If you have any questions with respect to the foregoing, please contact me at (425) 705-6858 or by email at peter.kraus@microsoft.com.

Sincerely,

Peter A. Kraus
Assistant General Counsel

cc: John Chevedden ***FISMA & OMB Memorandum M-07-16***

Enclosures

# Shareholder Proposals

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

sec.gov | 2011-10-18

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

**Date:** October 18, 2011

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

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

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

## A. The purpose of this bulletin

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

- Brokers and banks that constitute "record" holders under Rule 14a-8 (b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8;

- Common errors shareholders can avoid when submitting proof of ownership to companies;
- The submission of revised proposals;
- Procedures for withdrawing no-action requests regarding proposals submitted by multiple proponents; and
- The Division's new process for transmitting Rule 14a-8 no-action responses by email.

You can find additional guidance regarding Rule 14a-8 in the following bulletins that are available on the Commission's website: SLB No. 14, SLB No. 14A, SLB No. 14B, SLB No. 14C, SLB No. 14D and SLB No. 14E.

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

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

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

The steps that a shareholder must take to verify his or her eligibility to submit a proposal depend on how the shareholder owns the securities. There are two types of security holders in the U.S.: registered owners and beneficial owners.[2] Registered owners have a direct relationship with the issuer because their ownership of shares is listed on the records maintained by the issuer or

its transfer agent. If a shareholder is a registered owner, the company can independently confirm that the shareholder's holdings satisfy Rule 14a-8(b)'s eligibility requirement.

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

## 2. The role of the Depository Trust Company

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

## 3. Brokers and banks that constitute "record" holders under Rule 14a-8(b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8

In *The Hain Celestial Group, Inc.* (Oct. 1, 2008), we took the position that an introducing broker could be considered a "record" holder for purposes of Rule 14a-8(b)(2)(i). An introducing broker is a broker that engages in sales and other activities involving customer contact, such as opening customer accounts and accepting customer orders, but is not permitted to maintain custody of customer funds and securities.[6] Instead, an introducing broker engages another broker, known as a "clearing broker," to hold custody of client funds and securities, to clear and execute customer trades, and to handle other functions such as issuing confirmations of customer trades and customer account statements. Clearing brokers generally are DTC participants; introducing brokers generally are not. As introducing brokers generally are not DTC participants, and therefore typically do not appear on DTC's securities position listing, *Hain Celestial* has required companies to accept proof of ownership letters from brokers in cases where, unlike the positions of registered owners and brokers and banks that are DTC participants, the company is unable to verify the positions against its own or its transfer agent's records or against DTC's securities position listing.

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

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

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

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

Shareholders and companies can confirm whether a particular broker or bank is a DTC participant by checking DTC's participant list, which is currently available on the Internet at http://www.dtcc.com/~/media/Files/Downloads/client-center/DTC/alpha.ashx.

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

The shareholder will need to obtain proof of ownership from the DTC participant through which the securities are held. The shareholder should be able to find out who this DTC participant is by asking the shareholder's broker or bank.[9]

If the DTC participant knows the shareholder's broker or bank's holdings, but does not know the shareholder's holdings, a shareholder could satisfy Rule 14a-8(b)(2)(i) by obtaining and submitting two proof of ownership

statements verifying that, at the time the proposal was submitted, the required amount of securities were continuously held for at least one year – one from the shareholder's broker or bank confirming the shareholder's ownership, and the other from the DTC participant confirming the broker or bank's ownership.

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

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

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

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

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

period of only one year, thus failing to verify the shareholder's beneficial ownership over the required full one-year period preceding the date of the proposal's submission.

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

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

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

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

## D. The submission of revised proposals

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

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

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

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

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

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

exclude the initial proposal, it would also need to submit its reasons for excluding the initial proposal.

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

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

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

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

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

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

To date, the Division has transmitted copies of our Rule 14a-8 no-action responses, including copies of the correspondence we have received in connection with such requests, by U.S. mail to companies and proponents. We also post our response and the related correspondence to the Commission's website shortly after issuance of our response.

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

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

[1] *See* Rule 14a-8(b).

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

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

[4] DTC holds the deposited securities in "fungible bulk," meaning that there are no specifically identifiable shares directly owned by the DTC participants. Rather, each DTC participant holds a pro rata interest or position in the aggregate number of shares of a particular issuer held at DTC. Correspondingly, each customer of a DTC participant – such as an individual investor – owns a pro rata interest in the shares in which the DTC participant has a pro rata interest. *See* Proxy Mechanics Concept Release, at Section II.B.2.a.

[5] *See* Exchange Act Rule 17Ad-8.

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

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

[8] *Techne Corp.* (Sept. 20, 1988).

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

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

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

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

request to exclude an earlier proposal submitted by the same proponent or notified the proponent that the earlier proposal was excludable under the rule.

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

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

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

*http://www.sec.gov/interps/legal/cfslb14f.htm*

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

**Rule 14a-8**

**§ 240.14a-8 Shareholder proposals.**

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

**(a)** ***Question 1:*** What is a proposal? A shareholder proposal is your recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders. Your proposal should state as clearly as possible the course of action that you believe the company should follow. If your proposal is placed on the company's proxy card, the company must also provide in the form of proxy means for shareholders to specify by boxes a choice between approval or disapproval, or abstention. Unless otherwise indicated, the word "proposal" as used in this section refers both to your proposal, and to your corresponding statement in support of your proposal (if any).

**(b)** ***Question 2:*** Who is eligible to submit a proposal, and how do I demonstrate to the company that I am eligible?

**(1)** In order to be eligible to submit a proposal, you must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal. You must continue to hold those securities through the date of the meeting.

**(2)** If you are the registered holder of your securities, which means that your name appears in the company's records as a shareholder, the company can verify your eligibility on its own, although you will still have to provide the company with a written statement that you intend to continue to hold the securities through the date of the meeting of shareholders. However, if like many shareholders you are not a registered holder, the company likely does not know that you are a shareholder, or how many shares you own. In this case, at the time you submit your proposal, you must prove your eligibility to the company in one of two ways:

> **(i)** The first way is to submit to the company a written statement from the "record" holder of your securities (usually a broker or bank) verifying that, at the time you submitted your proposal, you continuously held the securities for at least one year. You must also include your own written statement that you intend to continue to hold the securities through the date of the meeting of shareholders; or
>
> **(ii)** The second way to prove ownership applies only if you have filed a Schedule 13D (§ 240.13d-101), Schedule 13G (§ 240.13d-102), Form 3 (§ 249.103 of this chapter), Form 4 (§ 249.104 of this chapter) and/or Form 5 (§ 249.105 of this chapter), or amendments to those documents or updated forms, reflecting your ownership of the shares as of or before the date

on which the one-year eligibility period begins. If you have filed one of these documents with the SEC, you may demonstrate your eligibility by submitting to the company:

**(A)** A copy of the schedule and/or form, and any subsequent amendments reporting a change in your ownership level;

**(B)** Your written statement that you continuously held the required number of shares for the one-year period as of the date of the statement; and

**(C)** Your written statement that you intend to continue ownership of the shares through the date of the company's annual or special meeting.

**(c)** ***Question 3:*** How many proposals may I submit? Each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting.

**(d)** ***Question 4:*** How long can my proposal be? The proposal, including any accompanying supporting statement, may not exceed 500 words.

**(e)** ***Question 5:*** What is the deadline for submitting a proposal?

**(1)** If you are submitting your proposal for the company's annual meeting, you can in most cases find the deadline in last year's proxy statement. However, if the company did not hold an annual meeting last year, or has changed the date of its meeting for this year more than 30 days from last year's meeting, you can usually find the deadline in one of the company's quarterly reports on Form 10-Q (§ 249.308a of this chapter), or in shareholder reports of investment companies under § 270.30d-1 of this chapter of the Investment Company Act of 1940. In order to avoid controversy, shareholders should submit their proposals by means, including electronic means, that permit them to prove the date of delivery.

**(2)** The deadline is calculated in the following manner if the proposal is submitted for a regularly scheduled annual meeting. The proposal must be received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting. However, if the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the deadline is a reasonable time before the company begins to print and send its proxy materials.

**(3)** If you are submitting your proposal for a meeting of shareholders other than a regularly scheduled annual meeting, the deadline is a reasonable time before the company begins to print and send its proxy materials.

**(f)** ***Question 6:*** What if I fail to follow one of the eligibility or procedural requirements explained in answers to Questions 1 through 4 of this section?

**(1)** The company may exclude your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it. Within 14 calendar days of receiving your proposal, the company must notify you in writing of any procedural or eligibility deficiencies, as well as of the time frame for your response. Your response must be postmarked, or transmitted electronically, no later than 14 days from the date you received the company's notification. A company need not provide you such

notice of a deficiency if the deficiency cannot be remedied, such as if you fail to submit a proposal by the company's properly determined deadline. If the company intends to exclude the proposal, it will later have to make a submission under § 240.14a-8 and provide you with a copy under Question 10 below, § 240.14a-8(j).

**(2)** If you fail in your promise to hold the required number of securities through the date of the meeting of shareholders, then the company will be permitted to exclude all of your proposals from its proxy materials for any meeting held in the following two calendar years.

**(g)** ***Question 7:*** Who has the burden of persuading the Commission or its staff that my proposal can be excluded? Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal.

**(h)** ***Question 8:*** Must I appear personally at the shareholders' meeting to present the proposal?

**(1)** Either you, or your representative who is qualified under state law to present the proposal on your behalf, must attend the meeting to present the proposal. Whether you attend the meeting yourself or send a qualified representative to the meeting in your place, you should make sure that you, or your representative, follow the proper state law procedures for attending the meeting and/or presenting your proposal.

**(2)** If the company holds its shareholder meeting in whole or in part via electronic media, and the company permits you or your representative to present your proposal via such media, then you may appear through electronic media rather than traveling to the meeting to appear in person.

**(3)** If you or your qualified representative fail to appear and present the proposal, without good cause, the company will be permitted to exclude all of your proposals from its proxy materials for any meetings held in the following two calendar years.

**(i)** ***Question 9:*** If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal?

**(1)** ***Improper under state law:*** If the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization;

> Note to paragraph ( i )(1): Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.

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

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

**(3)** ***Violation of proxy rules:*** If the proposal or supporting statement is contrary to any of the Commission's proxy rules, including § 240.14a-9, which prohibits materially false or misleading statements in proxy soliciting materials;

**(4)** ***Personal grievance; special interest:*** If the proposal relates to the redress of a personal claim or grievance against the company or any other person, or if it is designed to result in a benefit to you, or to further a personal interest, which is not shared by the other shareholders at large;

**(5)** ***Relevance:*** If the proposal relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business;

**(6)** ***Absence of power/authority:*** If the company would lack the power or authority to implement the proposal;

**(7)** ***Management functions:*** If the proposal deals with a matter relating to the company's ordinary business operations;

**(8)** ***Director elections:*** If the proposal:

**(i)** Would disqualify a nominee who is standing for election;

**(ii)** Would remove a director from office before his or her term expired;

**(iii)** Questions the competence, business judgment, or character of one or more nominees or directors;

**(iv)** Seeks to include a specific individual in the company's proxy materials for election to the board of directors; or

**(v)** Otherwise could affect the outcome of the upcoming election of directors.

**(9)** ***Conflicts with company's proposal:*** If the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting;

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

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

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

**(11)** ***Duplication:*** If the proposal substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting;

**(12)** ***Resubmissions:*** If the proposal deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding 5 calendar years, a company may exclude it from its proxy materials for any meeting held within 3 calendar years of the last time it was included if the proposal received:

**(i)** Less than 3% of the vote if proposed once within the preceding 5 calendar years;

**(ii)** Less than 6% of the vote on its last submission to shareholders if proposed twice previously within the preceding 5 calendar years; or

**(iii)** Less than 10% of the vote on its last submission to shareholders if proposed three times or more previously within the preceding 5 calendar years; and

**(13)** ***Specific amount of dividends:*** If the proposal relates to specific amounts of cash or stock dividends.

**(j)** ***Question 10:*** What procedures must the company follow if it intends to exclude my proposal?

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

**(2)** The company must file six paper copies of the following:

**(i)** ***The proposal;***

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

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

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

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

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

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

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

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

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

**(2)** However, if you believe that the company's opposition to your proposal contains materially false or misleading statements that may violate our anti-fraud rule, § 240.14a-9, you should promptly send to the Commission staff and the company a letter explaining the reasons for your view, along with a copy of the company's statements opposing your proposal. To the extent possible, your letter should include specific factual information demonstrating the inaccuracy of the company's claims. Time permitting, you may wish to try to work out your differences with the company by yourself before contacting the Commission staff.

**(3)** We require the company to send you a copy of its statements opposing your proposal before it sends its proxy materials, so that you may bring to our attention any materially false or misleading statements, under the following timeframes:

> **(i)** If our no-action response requires that you make revisions to your proposal or supporting statement as a condition to requiring the company to include it in its proxy materials, then the company must provide you with a copy of its opposition statements no later than 5 calendar days after the company receives a copy of your revised proposal; or
>
> **(ii)** In all other cases, the company must provide you with a copy of its opposition statements no later than 30 calendar days before its files definitive copies of its proxy statement and form of proxy under § 240.14a-6.

[63 FR 29119, May 28, 1998; 63 FR 50622, 50623, Sept. 22, 1998, as amended at 72 FR 4168, Jan. 29, 2007; 72 FR 70456, Dec. 11, 2007; 73 FR 977, Jan. 4, 2008; 76 FR 6045, Feb. 2, 2011; 75 FR 56782, Sept. 16, 2010]

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|---|---|---|
| To John Seethoff | From John Chevedden | |
| Co./Dept. | Co. | |
| Phone # | Phone # ***FISMA & OMB Memorandum M-07-16*** | |
| Fax # 425-706-7329 | Fax # | |

July 9, 2016

Kenneth Steiner

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

Re: Your TD Ameritrade account ending in ***FISMA & OMB Memorandum M-07-16*** at TD Ameritrade Clearing Inc. DTC #0188

Dear Kenneth Steiner,

Thank you for allowing me to assist you today. As you requested, this letter confirms that as of the date of this letter, you have continuously held no less than 500 shares of the following stock in the above reference account since July 1, 2014.

1. Microsoft Corporation (MSFT)

If we can be of any further assistance, please let us know. Just log in to your account and go to the Message Center to write us. You can also call Client Services at 800-669-3900. We're available 24 hours a day, seven days a week.

Sincerely,

Chris Blue
Resource Specialist
TD Ameritrade