THE PROPOSAL

The Proposal states:

> **Resolved**, that shareholders request the Board of Directors to issue a report by the end of 2018, at reasonable expense and excluding proprietary information, to assess the feasibility, above and beyond matters of legal compliance, of requiring senior executives to enter a covenant appropriately integrated to employment, award, benefits, options, indemnification or compensation agreements, in which they would be required each year, regardless of their personal fault, to reimburse the corporation for a portion of any fine or penalty imposed on the corporation by federal or state regulators or courts for activities which posed a systemic risk or which were harmful to consumers.

A copy of the Proposal and related correspondence from the Proponent is attached hereto as Exhibit A.

BASIS FOR EXCLUSION

We hereby respectfully request that the Staff concur in our view that the Proposal may be excluded from the 2018 Proxy Materials pursuant to Rule 14a-8(i)(10) because the Company has substantially implemented the Proposal.

ANALYSIS

The Proposal May Be Excluded Under Rule 14a-8(i)(10) Because The Company Has Substantially Implemented The Proposal.

Rule 14a-8(i)(10) permits a company to exclude a stockholder proposal from its proxy materials if the company has substantially implemented the proposal. The Commission stated in 1976 that the predecessor to Rule 14a-8(i)(10) was "designed to avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by the management." Exchange Act Release No. 12598 (July 7, 1976) (the "1976 Release"). Originally, the Staff narrowly interpreted this predecessor rule and granted no-action relief only when proposals were "'fully' effected" by the company. *See* Exchange Act Release No. 19135 (Oct. 14, 1982). By 1983, the Commission recognized that the "previous formalistic application of [the Rule] defeated its purpose" because proponents were successfully convincing the Staff to deny no-action relief by submitting proposals that differed from existing company policy by only a few words. Exchange Act Release No. 20091, at § II.E.6. (Aug. 16, 1983) (the "1983 Release"). Therefore, in 1983, the Commission adopted a revision to the rule to permit the omission of proposals that had been "substantially implemented." 1983 Release. The 1998 amendments to the proxy rules reaffirmed this position. *See* Exchange Act Release No. 40018 at n.30 and accompanying text (May 21, 1998).

Applying this standard, the Staff has noted that "a determination that the company has substantially implemented the proposal depends upon whether [the company's] particular policies, practices and procedures compare favorably with the guidelines of the proposal." *Texaco, Inc*. (avail. Mar. 28, 1991). In other words, substantial implementation under Rule 14a-8(i)(10) requires a company's actions to have satisfactorily addressed both the proposal's underlying concerns and its essential objective. *See, e.g*., *Anheuser-Busch Cos., Inc.* (avail. Jan. 17, 2007); *ConAgra Foods, Inc*. (avail. Jul. 3, 2006); *Johnson & Johnson* (avail. Feb. 17, 2006); *Talbots Inc*. (avail. Apr. 5, 2002); *Masco Corp*. (avail. Mar. 29, 1999).

The Board of Directors (the "Board"), acting through its Human Resources Committee (the "Committee") (to which the Board has delegated authority to oversee the Company's incentive compensation risk management program and compensation practices for senior executives),[1] assessed the feasibility, above and beyond matters of legal compliance, of requiring "senior executives to enter a covenant appropriately integrated to employment, award, benefits, options, indemnification or compensation agreements, in which they would be required each year, regardless of their personal fault, to reimburse the corporation for a portion of any fine or penalty imposed on the corporation by federal or state regulators or courts for activities which posed a systemic risk or which were harmful to consumers" (the "Covenant") and issued a report containing its assessment. The Company has made the report available to stockholders on its website[2] (the "Report"). A copy of the Report is attached hereto as Exhibit B.

The Report substantially implements the Proposal for purposes of Rule 14a-8(i)(10) because it implements the Proposal's essential objective of having a board-level assessment and report to stockholders on whether requiring the Covenant is feasible. In assessing feasibility, the Committee considered whether requiring the Covenant is both possible and suitable[3] for the Company "above and beyond matters of legal compliance." The Committee then concluded, as disclosed in the Report, that "with respect to matters other than legal compliance (as requested by the [P]roposal), aspects of the Covenant may be technically feasible . . . ." The Committee also advised the Board of its intent to publish the Report on the Board's behalf.

In considering the suitability of requiring the Covenant, the Committee assessed the practicability and appropriateness of the Covenant. The Report then discusses how the Committee assessed various policy implications of requiring the Covenant. Specifically, the Committee first analyzed the Covenant within the framework of the Company's established

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[1] *See* Wells Fargo & Company Human Resources Committee Charter, *available at* https://www08.wellsfargomedia.com/assets/pdf/about/corporate/human-resources-committee-charter.pdf.

[2] *See* Report of Human Resources Committee on the Feasibility of Implementing a No Personal Fault Senior Executive Covenant, *available at* https://www.wellsfargo.com/assets/pdf/about/corporate/human-resources-committee-report.pdf. The Report is also available as a link on the Company's Leadership and Governance webpage, *available at* https://www.wellsfargo.com/about/corporate/governance.

[3] *See* Webster's II New College Dictionary. "Feasible" is defined as: (1) "Capable of being accomplished or brought about : possible"; and (2) "Capable of being utilized or dealt with successfully : suitable."

compensation principles[4] and concluded that requiring the Covenant would contradict many of these principles. For example, requiring the Covenant would contradict the principle of "Pay for Performance" by precluding consideration of individual accountability and responsibility in requiring reimbursement. Additionally, requiring the Covenant would contradict the principle of "Attract and Retain Top Executive Talent" by making it more difficult to attract and retain skilled and experienced executive talent because executives could be penalized without connection to their own accountability and in a manner inconsistent with market practice. The Committee also analyzed the Covenant in light of the Company's existing clawback and forfeiture policies and provisions, which are "designed to . . . encourage the creation of long-term, sustainable performance and to discourage our executive officers from taking imprudent or excessive risks that would adversely impact our Company or harm our customers." The Committee then concluded, as disclosed in the Report, that the Covenant is not suitable for the Company because it "is neither practicable nor appropriate" for the Company.[5]

The Committee's assessment, as detailed in the Report posted on the Company's website, implements the matters requested in the Proposal. The Committee's actions implementing the Proposal thus present precisely the scenario contemplated by the Commission when it adopted the predecessor to Rule 14a-8(i)(10) "to avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by the management." 1976 Release. The Proposal asks the Board to issue a report "assess[ing] the feasibility, above and beyond matters of legal compliance, of requiring [the Covenant]." The Board, acting through the Committee, conducted and reported on that assessment, which is detailed in the Report that is posted on the Company's website. When a company has already acted favorably on an issue addressed in a stockholder proposal, Rule 14a-8(i)(10) does not require the company and its stockholders to reconsider the issue. In this regard, the Staff has on numerous occasions concurred with the exclusion of proposals under Rule 14a-8(i)(10) that pertained to executive compensation where the company addressed each element requested in the proposal. For example, in *Wal-Mart Stores, Inc.* (avail. Mar. 25, 2015), the Staff concurred that the company could exclude under Rule 14a-8(i)(10) a stockholder proposal requesting inclusion of "employee engagement" as a metric in determining senior executives' incentive compensation where, as disclosed in the proxy statement, the company already provided that each executive officer's compensation under its annual incentive plan could be reduced by up to 15% based on the extent to which he or she contributed to diversity and inclusion. *See also General Electric Co.* (avail. Jan. 23, 2010) (concurring with the exclusion of a proposal requesting that the board explore with certain executive officers the renunciation of stock option grants where the board had conducted discussions with the executive officers on that topic); *AutoNation Inc.* (avail. Feb. 16, 2005) (concurring with the exclusion of a proposal requesting that the board seek stockholder approval

[4] *See* Wells Fargo & Company's 2017 definitive proxy statement, *available at* https://www.sec.gov/Archives/edgar/data/72971/000119312517083591/d305364ddef14a.htm.

[5] In addition to implementing the Proposal's request for a report on the assessment "above and beyond matters of legal compliance" of requiring the Covenant, the Report references the potential legal implications of the Covenant in order to provide readers with a comprehensive overview of the implications of requiring the Covenant.

for future "golden parachutes" with senior executives where, after receiving the proposal, the company adopted a policy to submit any such arrangements to stockholder vote); *Intel Corp.* (avail. Mar. 11, 2003) (concurring that a proposal requesting Intel's board to submit to a stockholder vote all equity compensation plans and amendments to add shares to those plans that would result in material potential dilution was substantially implemented by a board policy requiring a stockholder vote on most, but not all, forms of company stock plans). *See also General Electric Co.* (avail. Dec. 24, 2009) (concurring with the exclusion of a proposal requesting that the company reevaluate its policy of, and prepare a report regarding, designing and selling nuclear reactors for the production of electrical power, in light of safety and environmental risks, where, in response to the proposal, the company made available on its website a report regarding its participation in the nuclear power business and its conclusion that nuclear power remained an important part of its energy business). Similarly, the Proposal has been substantially implemented by the Report by the Committee regarding its assessment of the feasibility of requiring the Covenant. Accordingly, the Proposal may be excluded under Rule 14a-8(i)(10) as substantially implemented.

We also note that the Proposal only requests an assessment of "the feasibility, above and beyond matters of legal compliance, of requiring senior executives to enter" into the Covenant. The Proposal does not specify what factors should be considered as part of this feasibility assessment. Moreover, the Staff consistently has concurred with the exclusion of similar proposals where companies published reports like the Report detailing various factors and matters that were considered. For example, in *The Dow Chemical Co.* (avail. Mar. 18, 2014, *recon. denied* Mar. 25, 2014), the Staff concurred with the exclusion of a proposal requesting that the company prepare a report "assessing the short and long term financial, reputational and operational impacts" of an environmental incident in Bhopal, India. The company argued that statements in a document included on its website providing "Q and A" with respect to the Bhopal incident substantially implemented the proposal. In making its determination, the Staff noted that "it appears that [the company's] public disclosures compare favorably with the guidelines of the proposal and that [the company] has, therefore, substantially implemented the proposal." *See also Target Corp. (Johnson and Thompson)* (avail. Mar. 26, 2013) (concurring with the exclusion of a proposal asking the board to study the feasibility of adopting a policy prohibiting the use of treasury funds for direct and indirect political contributions where the company had addressed company reviews of use of company funds for political purposes in a statement in opposition set forth in a previous proxy statement and five pages excerpted from a company report); *TECO Energy, Inc.* (avail. Feb. 21, 2013) (concurring with the exclusion of a proposal requesting a report on the environmental and public health effects of mountaintop removal operations, and the feasibility of mitigating measures, where the company had supplemented its sustainability report with a two-page report and four page table on the topic).

Further, the Staff has consistently granted exclusion when a proposal requests that the board take action and the board substantially implements the proposal through one of its committees. *See, e.g.*, *AT&T Inc.* (avail. Jan. 22, 2014) (concurring with the exclusion of a proposal that the board adopt a policy that in the event of a change of control, there shall be no acceleration of vesting of

any equity award granted to any senior executive when the human resources committee amended the relevant incentive plan); *Hewlett-Packard Co.* (avail. Dec. 18, 2013) (concurring with the exclusion of a proposal requesting that the board review and amend the company's human rights policies when the nominating and governance committee reviewed the human rights policies).

Accordingly, for the reasons set forth above, the Proposal may be excluded from the Company's 2018 Proxy Materials under Rule 14a-8(i)(10).

CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its 2018 Proxy Materials.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8287, or Mary E. Schaffner, Senior Vice President and Senior Company Counsel, at (612) 667-2367.

Sincerely,

Elizabeth A. Ising

Enclosures

cc: Mary E. Schaffner, Senior Vice President and Senior Company Counsel
Willie J. White, Esq., Vice President and Senior Counsel
John Harrington, Harrington Investments, Inc.