UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

March 13, 2019

Elizabeth A. Ising
Gibson Dunn & Crutcher LLP
shareholderproposals@gibsondumm.com

Re: The Southern Company
Incoming letter dated January 15, 2019

Dear Ms. Ising:

This letter is in response to your correspondence dated January 15, 2019 concerning the shareholder proposal (the "Proposal") submitted to The Southern Company (the "Company") by John Chevedden (the "Proponent") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders. Copies of all of the correspondence on which this response is based will be made available on our website at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml. For your reference, a brief discussion of the Division's informal procedures regarding shareholder proposals is also available at the same website address.

Sincerely,

M. Hughes Bates
Special Counsel

Enclosure:

cc: John Chevedden
***

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

March 13, 2019

Response of the Office of Chief Counsel
Division of Corporation Finance

Re: The Southern Company
Incoming letter dated January 15, 2019

The Proposal requests that the board take each step necessary so that each voting requirement in the Company's charter and bylaws (that is explicit or implicit due to default to state law) that calls for a greater than simple majority vote be eliminated and replaced by a requirement for a majority of the votes cast for and against applicable proposals, or a simple majority in compliance with applicable laws. If necessary, this means the closest standard to a majority of the votes cast for and against such proposals consistent with applicable laws. This includes taking the steps necessary to adjourn the annual meeting to solicit the votes necessary for approval if the votes for approval are lacking during the annual meeting.

There appears to be some basis for your view that the Company may exclude the Proposal under rule 14a-8(i)(10). In this regard, we note your representations that the Company will provide shareholders at its 2019 annual meeting with an opportunity to approve an amendment to its certificate of incorporation, which, if approved, will eliminate the supermajority voting provisions in the Company's governing documents. Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on rule 14a-8(i)(10). In reaching this position, we have not found it necessary to address the alternative bases for omission upon which the Company relies.

Sincerely,

Courtney Haseley
Special Counsel

DIVISION OF CORPORATION FINANCE
INFORMAL PROCEDURES REGARDING SHAREHOLDER PROPOSALS

The Division of Corporation Finance believes that its responsibility with respect to matters arising under Rule 14a-8 [17 CFR 240.14a-8], as with other matters under the proxy rules, is to aid those who must comply with the rule by offering informal advice and suggestions and to determine, initially, whether or not it may be appropriate in a particular matter to recommend enforcement action to the Commission. In connection with a shareholder proposal under Rule 14a-8, the Division's staff considers the information furnished to it by the company in support of its intention to exclude the proposal from the company's proxy materials, as well as any information furnished by the proponent or the proponent's representative.

Although Rule 14a-8(k) does not require any communications from shareholders to the Commission's staff, the staff will always consider information concerning alleged violations of the statutes and rules administered by the Commission, including arguments as to whether or not activities proposed to be taken would violate the statute or rule involved. The receipt by the staff of such information, however, should not be construed as changing the staff's informal procedures and proxy review into a formal or adversarial procedure.

It is important to note that the staff's no-action responses to Rule 14a-8(j) submissions reflect only informal views. The determinations reached in these no-action letters do not and cannot adjudicate the merits of a company's position with respect to the proposal. Only a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials. Accordingly, a discretionary determination not to recommend or take Commission enforcement action does not preclude a proponent, or any shareholder of a company, from pursuing any rights he or she may have against the company in court, should the company's management omit the proposal from the company's proxy materials.

GIBSON DUNN

Gibson, Dunn & Crutcher LLP

1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Tel 202.955.8500
www.gibsondunn.com

Elizabeth A. Ising
Direct: +1 202.955.8287
Fax: +1 202.530.9631
Eising@gibsondunn.com

January 15, 2019

VIA E-MAIL

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

Re: *The Southern Company*
Stockholder Proposal of John Chevedden
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

This letter is to inform you that our client, The Southern Company (the "Company"), intends to omit from its proxy statement and form of proxy for its 2019 Annual Meeting of Stockholders (collectively, the "2019 Proxy Materials") a stockholder proposal (the "Proposal") and statements in support thereof received from John Chevedden (the "Proponent").

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 intends to file its definitive 2019 Proxy Materials with the Commission; and

- concurrently sent a copy of this correspondence to the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("SLB 14D") provide that stockholder 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 Proponent that if he elects to submit additional correspondence to the Commission or the Staff with respect to the Proposal, 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.

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

THE PROPOSAL

The Proposal states:

> RESOLVED, Shareholders request that our board take each step necessary so that each voting requirement in our charter and bylaws (that is explicit or implicit due to default to state law) that calls for a greater than simple majority vote be eliminated, and replaced by a requirement for a majority of the votes cast for and against applicable proposals, or a simple majority in compliance with applicable laws. If necessary this means the closest standard to a majority of the votes cast for and against such proposals consistent with applicable laws. This includes taking the steps necessary to adjourn the annual meeting to solicit the votes necessary for approval if the votes for approval are lacking during the annual meeting.

A copy of the Proposal, the supporting statements and related correspondence from the Proponent are attached to this letter as Exhibit A.

BASES FOR EXCLUSION

We hereby respectfully request that the Staff concur in our view that the Proposal may be excluded from the 2019 Proxy Materials pursuant to:

- Rule 14a-8(i)(10) because the Company has substantially implemented the Proposal through the Company's Board of Directors (the "Board") approving a resolution seeking stockholder approval at the 2019 Annual Meeting of Stockholders of an amendment to the Company's Certificate of Incorporation (the "Certificate").

- Rule 14a-8(i)(7) because the Proposal relates to the Company's ordinary business operations;

- Rule 14a-8(i)(2) because implementing the Proposal in its entirety would cause the Company to violate Delaware law; and

- Rule 14a-8(i)(3) because the Proposal is impermissibly vague and indefinite so as to be inherently misleading.

ANALYSIS

I. The Proposal May Be Excluded Under Rule 14a-8(i)(10) As Substantially Implemented.

A. Rule 14a-8(i)(10) Background

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). 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 avoiding exclusion 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 the 1983 Release, the Commission adopted a revised interpretation of the rule to permit the omission of proposals that had been "substantially implemented," and the Commission codified this revised interpretation in Exchange Act Release No. 40018 at n.30 (May 21, 1998). Thus, when a company can demonstrate that it already has taken actions to address the underlying concerns and essential objectives of a stockholder proposal, the Staff has concurred that the proposal has been "substantially implemented" and may be excluded as moot. *See*, *e.g.*, *Exelon Corp.* (avail. Feb. 26, 2010); *Exxon Mobil Corp. (Burt)* (avail. Mar. 23, 2009); *Exxon Mobil Corp.* (avail. Jan. 24, 2001); *Masco Corp.* (Mar. 29, 1999); *The Gap, Inc.* (avail. Mar. 8, 1996). 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).

B. Action by the Board Substantially Implements the Proposal

As discussed above, the Proponent requests that the Board "take each step necessary so that each voting requirement in our charter and bylaws (that is explicit or implicit due to default to state law) that calls for a greater than simple majority vote be eliminated, and replaced by a requirement for a majority of the votes cast for and against applicable proposals, or a simple majority in compliance with applicable laws." The Company's By-Laws do not

contain any supermajority provisions. Moreover, as discussed below, the Company's stockholders have approved removing all but one supermajority voting provision in the Certificate. Specifically, the only provision in the Company's governing documents that includes supermajority voting requirements is Article Eleventh of the Certificate, which requires the affirmative vote of the holders of at least two-thirds of the Company's issued and outstanding common stock of the Company in order to:

- authorize or create any class of stock preferred as to dividends or assets over the common stock or reclassify the common stock or change the issued shares of common stock into the same or a greater or less number of shares of common stock either with or without par value or reduce the par value of the common stock (collectively, the "Stock Changes"); and

- amend, alter, change, or repeal subdivision (2) of Article Ninth (with respect to working capital determinations), Article Twelfth (with respect to preemptive rights), Article Eleventh (with respect to Stock Changes and amendments to the Certificate), or any provision contained in the Certificate or in any amendment thereto which provides for the vote of the holders of at least two-thirds of the issued and outstanding common stock.

The Board has adopted a resolution approving an amendment to the Certificate's Article Eleventh that will remove the supermajority voting requirements from Article Eleventh and replace them with a majority of the Company's outstanding common stock requirement (the "Proposed Certificate Amendment"). Moreover, the Board has approved submitting the Proposed Certificate Amendment to a stockholder vote at the 2019 Annual Meeting of Stockholders, which approval is required under Delaware law. If the Proposed Certificate Amendment receives the requisite stockholder approval, the Company's governing documents will not contain any supermajority voting requirements. Thus, the Proposed Certificate Amendment substantially implements the Proposal.

The Staff has consistently concurred that proposals, like the Proposal, are excludable under Rule 14a-8(i)(10), where the company removes the supermajority voting standards in its governing documents, as the Company has done with the Proposed Certificate Amendment. For example, in 2016, the Staff concurred that the Company could exclude under Rule 14a-8(i)(10) a substantially similar stockholder proposal submitted by the Proponent. After the Board approved amendments to replace the supermajority voting requirement in Article Eleventh with a majority of outstanding shares requirement and to delete the "fair price" provision—including the supermajority voting requirements—in Article Thirteenth, the Staff concurred with the exclusion under Rule 14a-8(i)(10) agreeing with the Company that

the proposed amendments "compare[d] favorably" with the guidelines of the stockholder proposal.[1] *See The Southern Co.* (avail. Feb. 26, 2016).

In addition, in 2017, the Staff concurred that the Company could exclude under Rule 14a-8(i)(10) a substantially similar stockholder proposal submitted by the Proponent. After the Board approved an amendment to replace the then only remaining supermajority voting requirement in Article Eleventh with a majority of outstanding shares requirement and submission of such amendment to a stockholder vote at the 2017 Annual Meeting of Stockholders, the Staff concurred with exclusion under Rule 14a-8(i)(10) agreeing with the Company has substantially implemented the stockholder proposal.[2] *See The Southern Co.* (avail. Feb. 24, 2017). *See also Korn/Ferry International* (avail. July 6, 2017); *Visa Inc.* (avail. Nov. 14, 2014); *Hewlett-Packard Co.* (avail. Dec. 19, 2013) (each concurring with the exclusion of a simple majority stockholder proposal as substantially implemented where the company's board of directors approved amendments to the company's governing documents that would replace each provision that called for a supermajority vote with a majority of outstanding shares vote requirement).

Here, the Proposed Certificate Amendment is identical to the Article Eleventh amendment that the Staff considered in *The Southern Co.* (2016) and *The Southern Co.* (2017). Moreover, the goals of the Proposal and the stockholder proposals in *The Southern Co.* (2016) and *The Southern Co.* (2017) are identical—replacing supermajority voting standards in the Company's governing documents with a simple majority voting standard. We note that the Proposal also references "implicit" voting standards "in" the Certificate and By-Laws and that there are certain provisions under Delaware law that, unless otherwise provided in the Certificate, require a supermajority voting requirement. However, such provisions are not "in" the Certificate or By-Laws. Stated another way, other than the standard in Article Eleventh that the Board has approved removing in the Proposed Certificate Amendment, there is no supermajority voting provision in the Company's governing documents that may be eliminated that would change the statutory voting

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[1] The Board recommended that stockholders vote "for" those amendments at the 2016 Annual Meeting of Stockholders. However, while the amendment to delete the "fair price" provisions passed at the Company's 2016 Annual Meeting of Stockholders, the amendment to replace the supermajority voting requirement in Article Eleventh with a majority of outstanding shares requirement failed to receive the requisite stockholder support.

[2] The Board recommended that stockholders vote "for" the amendment to replace the supermajority voting requirement in Article Eleventh with a majority of outstanding shares requirement at the 2017 Annual Meeting of Stockholders. However, the amendment failed to receive the requisite stockholder support.

requirement established by Delaware law. Thus, the Proposal is excludable under Rule 14a-8(i)(10) like the stockholder proposals in *The Southern Co*. (2016) and *The Southern Co*. (2017).

In addition, the Staff consistently has granted no-action relief in situations where the board lacks unilateral authority to adopt amendments to a certificate of incorporation or bylaws but has taken all of the steps within its power to eliminate the supermajority voting requirements in those documents and submitted the issue for stockholder approval. For example, in *Visa Inc.* discussed above and in *McKesson Corp*. (avail. Apr. 8, 2011), the company's board approved certificate amendments to eliminate supermajority voting provisions, which would only become effective upon stockholder approval. The Staff concurred in the exclusion of the proposal under Rule 14a-8(i)(10) based on the actions taken by the board. *See also American Tower Corp.* (avail. Apr. 5, 2011) (concurring with the exclusion under Rule 14a-8(i)(10) of a proposal requesting that each supermajority stockholder voting requirement "be changed to a majority of the votes cast for and against the proposal in compliance with applicable laws" where the board approved submitting an amendment to the certificate of incorporation to the company's stockholders for approval that would reduce the stockholder vote required to amend the bylaws from 66 2/3% to a majority of the then-outstanding shares); *Applied Materials, Inc*. (avail. Dec. 19, 2008) (concurring with exclusion of a simple majority proposal when the company represented that stockholders would have the opportunity to vote on a company proposal that eliminated certain supermajority provisions in their entirety and reduced the voting threshold for other provisions to a majority of outstanding shares).

II. The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because The Proposal Relates To The Company's Ordinary Business Operations.

Rule 14a-8(i)(7) permits a company to omit from its proxy materials a stockholder proposal that relates to the company's "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 stated 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. The first is that "[c]ertain

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 second consideration is related to "the degree to which the proposal seeks to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." Id. (citing Exchange Act Release No. 12999 (Nov. 22, 1976)).

The Staff has consistently concurred with the exclusion of stockholder proposals under Rule 14a-8(i)(7) when those proposals related to the conduct of a company's annual meeting. For example, in *USA Technologies, Inc.* (avail. Mar. 11, 2016), the Staff concurred with the exclusion of a stockholder proposal requesting that the "bylaws be amended to include rules of conduct at all meetings of shareholders" because it related to the company's ordinary business operations, noting that the "proposal relates to the conduct of shareholder meetings." *See also Comcast Corp.* (avail. Feb. 28, 2018) (concurring with the exclusion of a proposal requesting that the "board adopt a corporate governance policy affirming the continuation of in-person annual meetings in addition to internet access to the meeting" because it related to the company's ordinary business operations, noting that the "[p]roposal relates to the determination of whether to hold annual meetings in person"); *Servotronics, Inc.* (avail. Feb. 19, 2015) (concurring with the exclusion of a proposal requesting that "a question-and-answer period be included in conjunction with the [company's annual meeting]" because it related to the company's ordinary business operations, noting that "[p]roposals concerning the conduct of shareholder meetings generally are excludable under Rule 14a-8(i)(7)"); *Verizon Communications Inc.* (avail. Jan. 22, 2015) (concurring with the exclusion of a proposal requesting that the board "adopt a policy that prior to the [annual meeting], the preliminary outcome of votes cast by proxy on uncontested matters . . . shall not be available to management or the [b]oard" because it related to the company's ordinary business operations, noting that the "[p]roposal relates to the conduct of the [c]ompany's annual meetings"); *Mattel, Inc.* (avail. Jan. 14, 2014) (concurring with the exclusion of a proposal requesting that the chairman of the company "answer with accuracy the questions asked by shareholders at the [a]nnual [m]eeting" because it related to the company's ordinary business operations, noting that "[p]roposals concerning the conduct of shareholder meetings generally are excludable under [R]ule 14a-8(i)(7)"); *Citigroup Inc. (Mathis, Jr.)* (avail. Feb. 7, 2013) (concurring with the exclusion of a proposal requesting for a "reasonable amount of time before and after the annual meeting for shareholder dialogue with directors" because it related to the company's ordinary business operations, noting that "[p]roposals concerning the conduct of shareholder meetings generally are excludable under [R]ule 14a-8(i)(7)"); *Bank of America Corp.* (avail. Dec. 22, 2009) (concurring with the exclusion of a proposal requesting that all stockholders be "entitled to attend and speak at any and all annual meetings" because it related to the

company's ordinary business, noting that "[p]roposals concerning the conduct of shareholder meetings generally are excludable under [R]ule 14a-8(i)(7)"); *Exxon Mobil Corp.* (avail. Mar. 2, 2005) (concurring with the exclusion of a proposal requesting that the board amend the company's "corporate governance guidelines to provide that a time be set aside at each annual meeting for shareholders to ask questions and receive replies from non-employee directors" because it related to the company's "ordinary business operations (*i.e.*, conduct of annual meetings)"); *Con-way, Inc.* (avail. Jan 22, 2009) (concurring with the exclusion of a proposal requesting that the board "take the necessary steps to ensure that future [annual stockholder meetings] be distributed over the Internet using webcast technology" because it related to the company's "ordinary business operations (*i.e.*, shareholder relations and the conduct of annual meetings)").

Similarly, the Proposal seeks to impose "rules of conduct" at a stockholders' meeting – namely regarding adjournments of the meeting – as in *USA Technologies, Inc.* The Proposal requests that the Company "tak[e] the steps necessary to adjourn the annual meeting to solicit the votes necessary for approval if the votes for approval are lacking during the annual meeting." "[T]he adjournment of the annual meeting" requested by the Proposal concerns the conduct of the Company's annual meeting, a matter the Staff has consistently determined relates to a company's ordinary business operations. Therefore, the Proposal may be excluded from the 2019 Proxy Materials pursuant to Rule 14a-8(i)(7).

III. The Proposal May Be Excluded Under Rule 14a-8(i)(2) Because Implementing The Proposal Would Cause The Company To Violate Delaware Law.

Rule 14a-8(i)(2) allows the exclusion of a proposal if implementation of the proposal would "cause the company to violate any state, federal, or foreign law to which it is subject." *See McDonald's Corp.* (avail. Mar. 16, 2017); *Kimberly-Clark Corp.* (avail. Dec. 18, 2009); *Bank of America Corp.* (avail. Feb. 11, 2009). For the reasons set forth in the legal opinion provided by Richards, Layton & Finger PA regarding Delaware law (the "Delaware Law Opinion"), the Company believes that the Proposal is excludable under Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate Delaware law. A copy of the Delaware Law Opinion is attached to this letter as Exhibit B.

On numerous occasions, the Staff has concurred with the exclusion of stockholder proposals where the proposal, if implemented, would violate state law. For example, in *CA, Inc.* (avail. Jul. 17, 2008), the Staff concurred with exclusion under Rule 14a-8(i)(2) of a proposal because the bylaw amendment requested by the proposal had the potential to prevent the board of directors from exercising their full managerial power in accordance with their fiduciary duties, and therefore was invalid under Delaware law. *See also Bank of*

America Corp. (avail. Feb. 23, 2012) (concurring with the exclusion under Rule 14a-8(i)(2) of a proposal that requested that the company take action, including amending the bylaws, to "minimize" the indemnification of directors because it would violate the indemnification provisions of Delaware law). Similarly, in *Bank of America Corp.* (avail. Feb. 11, 2009), the Staff concurred with the exclusion of a proposal to amend the company's bylaws to establish a board committee and authorize the board chairman to appoint members of the committee. The proposal was excluded under Rule 14a-8(i)(2) as Delaware law provides that only the board can appoint members of the board committees; stockholders cannot specify how committee members are to be appointed. *See* 8 Del. C. § 141(c)(2); § 141(a). *See also IDACORP, Inc.* (avail. Mar. 13, 2012) (concurring with the exclusion of a proposal requesting that the company amend its bylaws to implement majority voting for director elections where state law provided for plurality voting unless a company's certificate of incorporation provided otherwise).

The Proposal asks the Board take "the steps necessary to adjourn the annual meeting to solicit the votes necessary for approval if the votes for approval are lacking during the annual meeting." The Company is a Delaware corporation subject to Delaware law. As discussed in detail in the Delaware Law Opinion, implementation of the Proposal would violate Delaware law in three respects. First, implementation of the Proposal would impermissibly require the Board or the officer or director of the Company presiding at the annual meeting to adjourn the annual meeting even when doing so is inconsistent with their fiduciary duties and subject to equitable challenge as a breach of fiduciary duty. Second, implementation of the Proposal would impermissibly impinge on the authority of the Board under Sections 141(a) and 213 of the General Corporation Law of the State of Delaware by requiring the Board to both adjourn the annual meeting and expend corporate funds on the adjournment of the annual meeting and the solicitation of further votes in favor of the approval of the Proposal as well as at some point require the Board to fix a new record date for determining the stockholders entitled to notice of and to vote at the adjourned meeting. Finally, since the Proposal would require the annual meeting to be adjourned to solicit any necessary additional votes only after a determination that "votes for approval are lacking" and such a determination can only be definitively made after the polls are closed at the meeting and the right to vote thereon has been terminated, implementation of the Proposal would impermissibly require the Company to continue to solicit the necessary votes even after the polls have been closed and the right to vote thereon has been terminated.

Accordingly, just as in *CA, Inc.* and other precedents cited above, the Proposal may properly be excluded under Rule 14a-8(i)(2) because, as cited in the Delaware Law Opinion, implementing the Proposal would cause the Company to violate Delaware law.

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

Rule 14a-8(i)(3) permits the exclusion of a stockholder proposal if the proposal or supporting statement is contrary to any of the Commission's proxy rules or regulations, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. For the reasons discussed below, the Proposal is so vague and indefinite as to be misleading and, therefore, excludable under Rule 14a-8(i)(3) because "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); *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 stockholder proposal where the company argued that its stockholders "would not know with any certainty what they are voting either for or against").

The Staff has consistently concurred that stockholder proposals are excludable under Rule 14a-8(i)(3) when the "meaning and application of terms and conditions . . . in the proposal would have to be made without guidance from the proposal and would be subject to differing interpretations" such that "any action ultimately taken by the [c]ompany upon implementation could be significantly different from the actions envisioned by shareholders voting on the proposal." *Fuqua Industries, Inc.* (avail. Mar 12, 1991). Also, in *Prudential Financial, Inc.* (avail. Feb. 16, 2007), the Staff concurred with the exclusion of a stockholder proposal seeking stockholder approval of certain "senior management incentive compensation programs that tied compensation to earnings and that were solely the result of management controlled programs" because the proposal was subject to differing interpretations. One interpretation was that the proposal sought stockholder approval of only those senior management incentive programs that tied compensation to earnings and that were solely the result of management controlled programs. Another interpretation was that the proposal requested that senior management incentive programs be tied to earnings resulting solely from management controlled programs and that such programs be approved by stockholders. *See also Bank Mutual Corp.* (avail. Jan. 11, 2005) (concurring with the exclusion of a stockholder proposal requesting that "a mandatory retirement age be established for all directors upon attaining the age of 72 years" because it was unclear whether the proposal required all directors retire after attaining the age of 72 where the plain

language of the proposal simply required that a retirement age be set upon a director attaining the age of 72.)

Similarly, the Proposal may be excluded because the stockholders of the Company cannot determine with any level of certainty what the Proposal requires. For example, the meaning of the Proposal's request for the adjournment of the annual meeting is unclear in several respects. First, when such adjournment as required is unclear as the Proposal only refers to adjourning "the annual meeting," which could mean the annual meeting where the Proposal would be voted on (and mean obtaining "the votes necessary for approval" of the Proposal) or the annual meeting where any implementing amendments would be voted on (and mean obtaining "the votes necessary for approval" of the amendments). Moreover, the Proposal's reference to "solicit[ing] the votes necessary for approval" is unclear. The Proposal could mean that such solicitation need only last until the meeting is reconvened. Alternatively, it could mean that the solicitation should continue until "the votes necessary for approval" are received, which could be indefinite. Given the unpredictability of voting results, these different approaches could have vastly different impacts on the Company's meeting. Finally, the Proposal refers to "voting requirements in our charter and bylaws" that are "implicit due to default to state law." To the extent that this phrase referencing "implicit" standards is read to ignore the reference to such provisions being "in" the Company's governing documents (see Section I above), stockholders voting on the Proposal will not be able to determine with any certainty the meaning of the "implicit" standards covered by the Proposal. For example, stockholders will not have an understanding of which provisions under Delaware law that it references and thus the impact of voting "for" the Proposal.

Given the vagueness of these key provisions in the Proposal, any action ultimately taken by the Company upon implementation of the Proposal could be significantly different from the actions envisioned by stockholders voting on the Proposal. Therefore, the Proposal is excludable under Rule 14a-8(i)(3) because it is impermissibly vague and indefinite.

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, including its supporting statements, from its 2019 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 Laura O. Hewett, the Company's Vice President, Corporate Governance, at (404) 506-0714.

Sincerely,

Elizabeth A. Ising

cc: Laura O. Hewett, The Southern Company
John Chevedden

EXHIBIT A

John Chevedden
***

Ms. Melissa K. Caen
Corporate Secretary
The Southern Company (SO)
30 Ivan Allen Jr. Blvd NW
Atlanta GA 30308
PH: 404-506-5000
PH: 404-506-0684
FX: 404-506-0344
FX: 404-506-0455

Dear Ms. Caen,

This Rule 14a-8 proposal is respectfully submitted in support of the long-term performance of our company.

This Rule 14a-8 proposal is intended as a low-cost method to improve company performance – especially compared to the substantial capitalization of our company.

This proposal is for the annual shareholder meeting. Rule 14a-8 requirements will be met including the continuous ownership of the required stock value until after the date of the respective shareholder meeting and presentation of the proposal at the annual meeting. This submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication.

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 this proposal by email tc ***

Sincerely,

John Chevedden

November 7, 2015

Date

cc: Laura O. Hewett <lohewett@southernco.com
Assistant Secretary
Jessica Ackel <jnackel@southernco.com>
Glen Kundert <gakunder@southernco.com>

[SO: Rule 14a-8 Proposal, November 7, 2018]
[This line and any line above it – *Not* for publication.]

Proposal [4] – Simple Majority Vote

RESOLVED, Shareholders request that our board take each step necessary so that each voting requirement in our charter and bylaws (that is explicit or implicit due to default to state law) that calls for a greater than simple majority vote be eliminated, and replaced by a requirement for a majority of the votes cast for and against applicable proposals, or a simple majority in compliance with applicable laws. If necessary this means the closest standard to a majority of the votes cast for and against such proposals consistent with applicable laws. This includes taking the steps necessary to adjourn the annual meeting to solicit the votes necessary for approval if the votes for approval are lacking during the annual meeting.

Adjourn appears 8-times in the company governing documents. This proposal topic won positive votes by a 40-to-one ratio in 2017. The trouble was that our directors failed to solicit enough votes for passage although shareholder support was 40-to-one. Ms. Veronica Hagen chaired our governance committee in 2017 and thus the finger seems to point to Ms. Hagen. This does not seem to be a good reference for Ms. Hagen's qualifications as a Board member at American Water Works (AWK), Newmont Mining Corp (NEM) and Stericycle (SRCL). There is no excuse for failure to respect a 40-to-one vote of shareholders.

Shareholders are willing to pay a premium for shares of companies that have excellent corporate governance. Supermajority voting requirements have been found to be one of 6 entrenching mechanisms that are negatively related to company performance according to "What Matters in Corporate Governance" by Lucien Bebchuk, Alma Cohen and Allen Ferrell of the Harvard Law School. Supermajority requirements are used to block initiatives supported by most shareowners but opposed by a status quo management.

This proposal topic won from 74% to 88% support at Weyerhaeuser, Alcoa, Waste Management, Goldman Sachs, FirstEnergy, McGraw-Hill and Macy's. The proponents of these proposals included Ray T. Chevedden and William Steiner. The votes would have been higher than 74% to 88% if all shareholders had equal access to independent proxy voting advice.

Currently a 1%-minority can frustrate the will of our 66%-shareholder majority in an election in which 67% of shares cast ballots. In other words a 1%-minority have the power to prevent 66% of shareholders from taking important action such as eliminating 67%-voting thresholds in our governing documents.

Please vote yes:
Simple Majority Vote – Proposal [4]
[The above line – *Is* for publication.]

John Chevedden, *** sponsors this proposal.

Notes:
This proposal is believed to conform with Staff Legal Bulletin No. 14B (CF), September 15, 2004 including (emphasis added):

Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on rule 14a-8(l)(3) in the following circumstances:

- the company objects to factual assertions because they are not supported;
- the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
- the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or
- the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.

We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.

See also: Sun Microsystems, Inc. (July 21, 2005).

The stock supporting this proposal will be held until after the annual meeting and the proposal will be presented at the annual meeting. Please acknowledge this proposal promptly by email
***

Personal Investing

P.O. Box 770001
Cincinnati, OH 45277-0045

November 19, 2018

John R Chevedden
***

To Whom It May Concern:

This letter is provided at the request of Mr. John R. Chevedden, a customer of Fidelity Investments.

Please accept this letter as confirmation that as of the date of this letter, Mr. Chevedden has continuously owned no fewer than the share quantity listed in the following table in the following security, since June 1st, 2017:

Security Name	CUSIP	Symbol	Share Quantity
AES Corp	00130H105	AES	250
Southern Co	842587107	SO	100
Pinnacle West Capital Corp	723484101	PNW	50
International Business Machines Corp	459200101	IBM	25
Wells Fargo & Co	949746101	WFC	100

These securities are registered in the name of National Financial Services LLC, a DTC participant (DTC number: 0226) and Fidelity Investments subsidiary.

I hope you find this information helpful. If you have any questions regarding this issue, please feel free to contact me by calling 800-397-9945 between the hours of 8:30 a.m. and 5:00 p.m. Eastern Standard Time (Monday through Friday) and entering my extension 13813 when prompted.

Sincerely,

Stormy Delehanty
Personal Investing Operations

Our File: W884345-19NOV18

EXHIBIT B

RICHARDS LAYTON & FINGER
Attorneys at Law

January 15, 2019

The Southern Company
30 Ivan Allen Jr. Blvd NW
Atlanta, GA 30308

Re: Stockholder Proposal Submitted by John Chevedden

Ladies and Gentlemen:

We have acted as special Delaware counsel to The Southern Company, a Delaware corporation (the "Company"), in connection with a stockholder proposal (the "Proposal"), dated November 7, 2018 that has been submitted to the Company by John Chevedden (the "Proponent") for the 2019 annual meeting of stockholders of the Company (the "Annual Meeting"). In this connection, you have requested our opinion as to certain matters under the laws of the State of Delaware.

For the purpose of rendering our opinion as expressed herein, we have been furnished with and have reviewed the following documents: (i) the Certificate of Incorporation of the Company, as filed with the Secretary of State of the State of Delaware (the "Secretary of State") on November 9, 1945, as subsequently amended through filings with the Secretary of State between January 21, 1946 and May 26, 2016 (collectively, the "Certificate of Incorporation"); (ii) the Bylaws of the Company, as amended effective May 25, 2016 (the "Bylaws"); and (iii) the Proposal.

With respect to the foregoing documents, we have assumed: (i) the authenticity of all documents submitted to us as originals; (ii) the conformity to authentic originals of all documents submitted to us as copies; (iii) the genuineness of all signatures and the legal capacity of natural persons; and (iv) that the foregoing documents, in the forms thereof submitted to us for our review, have not been and will not be altered or amended in any respect material to our opinion as expressed herein. We have not reviewed any document other than the documents listed above for purposes of rendering this opinion, and we assume that there exists no provision of any such other document that bears upon or is inconsistent with our opinion as expressed herein. In addition, we have conducted no independent factual investigation of our own but rather have relied solely on the foregoing documents, the statements and information set forth therein and the additional factual matters recited or assumed herein, all of which we assume to be true, complete and accurate in all material respects.

THE PROPOSAL

The Proposal states the following:

> "RESOLVED, Shareholders request that our board take each step necessary so that each voting requirement in our charter and bylaws (that is explicit or implicit due to default to state law) that calls for a greater than simple majority vote be eliminated, and replaced by a requirement for a majority of the votes cast for and against applicable proposals, or a simple majority in compliance with applicable laws. If necessary this means the closest standard to a majority of the votes cast for and against such proposals consistent with applicable laws. This includes taking the steps necessary to adjourn the annual meeting to solicit the votes necessary for approval if the votes for approval are lacking during the annual meeting."

We have been advised that the Company is considering excluding the Proposal from the Company's proxy statement for the Annual Meeting under, among other reasons, Rule 14a-8(i)(2) promulgated under the Securities Exchange Act of 1934, as amended. Rule 14a-8(i)(2) provides that a registrant may omit a proposal from its proxy statement when "the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." In this connection, you have requested our opinion as to whether, under Delaware law, the Proposal, if implemented, would violate Delaware law.

DISCUSSION

For the reasons set forth below, since the Proposal would require the Company to adjourn the Annual Meeting until such time as there are sufficient votes necessary to approve the Proposal or the Amendments (as defined herein), the Proposal, if implemented, would violate Delaware law in that it would impermissibly (i) require the Board of Directors of the Company (the "Board") or the officer or director of the Company presiding at the Annual Meeting (the "Chairperson") to adjourn the Annual Meeting even in circumstances where doing so is inconsistent with their fiduciary duties and subject to equitable challenge as a breach of fiduciary duty, (ii) impinge on the authority of the Board under Sections 141(a) and 213 of the General Corporation Law of the State of Delaware (the "General Corporation Law") and (iii) require the Company to continue to solicit votes to approve the Proposal or the Amendments even after the polls have been closed and the right to vote thereon has been terminated.[1]

[1] We note that it is not clear from the Proposal whether it is intended that the Company take the steps necessary to adjourn (x) the Annual Meeting if the votes are lacking to approve the Proposal, and/or (y) the stockholder meeting at which a proposal to eliminate the supermajority

The Proposal includes a requirement that the Company take the steps necessary "to adjourn the annual meeting to solicit the votes necessary for approval if the votes for approval are lacking during the annual meeting." As such, the Proposal would require the Board or the Chairperson to adjourn the Annual Meeting to solicit the votes necessary for approval of the Proposal or the Amendments if the votes are lacking during the meeting. Indeed, the Proposal contains no limitation on how many times the Annual Meeting must be adjourned. Rather, the Proposal suggests that the Annual Meeting must continue to be adjourned and reconvened ad infinitum until such time as there are sufficient votes necessary to approve the Proposal or the Amendments.

A. The Proposal, if Implemented, Would Impermissibly Require Adjournment Even in Circumstances Where Adjournment is Inconsistent with Applicable Fiduciary Duties and Subject to Equitable Challenge as a Breach of Fiduciary Duty

Under the construct of Delaware corporate law, the board of directors manages the business and affairs of the corporation and the officers of the corporation are the principal agents of the corporation who carry out the directives of the board of directors. In order to carry out its mandate, the board of directors of a Delaware corporation is granted broad and varied powers, certain of which may be delegated to the officers of the corporation. The exercise of these powers by the board of directors and the officers of a corporation is not unfettered. Rather, in exercising such managerial authority, the board of directors and the officers of the corporation owe fiduciary duties to the corporation and all of its stockholders.[2] As such, the actions taken by the board of directors and the officers of the corporation are subject to equitable challenge.

In the adjournment context, the Court of Chancery of the State of Delaware (the "Court of Chancery") has stated that "in deciding to adjourn . . . a meeting, officers and directors must abide by their fiduciary duties to shareholders. Where a decision to adjourn is made due to an improper purpose, that decision may be challenged as a breach of fiduciary duty."[3] The Court

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provisions in the Certificate of Incorporation is presented to the stockholders (the "Amendments"). Although for purposes of our opinion as set forth herein we assume the Proposal intends for the mandate to apply to the Annual Meeting, the Proposal, if implemented, would violate Delaware law for the reasons set forth herein under either interpretation.

[2] *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009) ("[O]fficers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and . . . the fiduciary duties of officers are the same as those of directors."); *City of Miami Gen. Emps' & Sanitation Emps' Ret. Trust v. Comstock*, 2016 WL 4464156, at *22 (Del. Ch. Aug. 24, 2016) ("Under Delaware law, officers owe the same fiduciary duties as directors.").

[3] *State of Wis. Inv. Bd. v. Peerless Sys. Corp.*, 2001 WL 32639, at *2 (Del. Ch. Jan. 5, 2001); *see also* R. Franklin Balotti, Jesse A. Finkelstein & Gregory P. Williams, *Meetings of Stockholders*, § 8.11, at 8-21 (3d ed. 2018 supp.) ("[T]he decision to adjourn, when made by officers or directors, is subject to their fiduciary duties to shareholders.").

of Chancery has recognized that one such improper purpose for an adjournment is an adjournment that is "specifically aimed at interfering with the results of a valid shareholder vote," which the Court noted would "bestir deep judicial suspicion."[4] The Court further stated that "[a]ny efforts by those controlling the vote to alter the results of that vote, even where there is no clear conflict of interest between the directors and the shareholders, must be undertaken with extreme caution so as not to undermine the legitimacy of the corporate structure itself."[5] Here, the Proposal would require the Board or the Chairperson to adjourn the Annual Meeting precisely for the purpose of altering the results of a valid stockholder vote on the Proposal or the Amendments as it would require the Annual Meeting to be adjourned only if there were not sufficient votes to approve the Proposal or the Amendments at the meeting. As noted above, the Proposal would require the Board or the Chairperson to continue adjourning and reconvening the meeting perpetually until such time as a different result (namely, the approval of the Proposal or the Amendments) was achieved.

Furthermore, although the Court of Chancery has recognized that there are circumstances in which an adjournment to solicit additional votes in favor of a proposal may be consistent with a board's or officer's fiduciary duties,[6] there is no "fiduciary out" under the Proposal that would allow the Board or the Chairperson to decline to adjourn the Annual Meeting if such an adjournment was inconsistent with their fiduciary duties. Thus, the Proposal mandates the adjournment, even if under the then existing circumstances the Board or the Chairperson (as applicable) determine their fiduciary duties require them to do otherwise.

The Court of Chancery has also stated that "when directors believe that measures are in the stockholders' best interests, they have a fiduciary duty to pursue the implementation of those measures in an efficient fashion."[7] As noted above, the Proposal does not state how many times the Annual Meeting must be adjourned before the obligation to adjourn the Annual Meeting expires and suggests that the Annual Meeting must continue to be adjourned each time it is reconvened if, at such time, there are not sufficient votes to approve the Proposal or the Amendments. Adjourning and reconvening a meeting of stockholders will require the Company to expend significant time and expense. The Proposal, however, does not permit the Board or the Chairperson to determine whether expending such time and expense is consistent with their

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[4] *State of Wis. Inv. Bd. v. Peerless Sys. Corp.*, 2000 WL 1805376, at *19 (Del. Ch. Dec. 4, 2000).

[5] *Id.*

[6] *See Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 808 (Del. Ch. 2007) (noting that while directors cannot "use inequitable means that dupe or dragoon stockholders into consenting" to matters submitted to the stockholders for their approval, directors "can use the legal means at their disposal in order to pursue stockholder approval" including "tools like the ability to set and revise meeting dates or to adjourn a convened meeting.").

[7] *Id.* at 808.

fiduciary duties, including the duty to seek stockholder approval of measures requiring such approval in an efficient fashion.

Because the Proposal would impermissibly require the Board or the Chairperson to adjourn the Annual Meeting even in circumstances where doing so is inconsistent with their fiduciary duties and subject to equitable challenge as a breach of fiduciary duty, the Proposal, if implemented, would violate Delaware law.

B. The Proposal, if Implemented, Would Impermissibility Impinge on the Authority of the Board under Sections 141(a) and 213 of the General Corporation Law

Section 141(a) of the General Corporation Law provides:

> The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.[8]

Significantly, if there is to be any variation from the mandate of Section 141(a), it can only be as "otherwise provided in [the General Corporation Law] or in its certificate of incorporation."[9] The Certificate of Incorporation does not provide for management of the Company by persons other than the Board. Thus, the Board possesses the full power and

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[8] 8 *Del. C.* § 141(a). *See also* Section 12 of the Bylaws ("The business of the Corporation shall be managed by a Board of Directors.").

[9] *See, e.g.*, *Lehrman v. Cohen*, 222 A.2d 800, 808 (Del. 1966). We note that Section 113 of the General Corporation Law permits a corporation to adopt bylaws providing for the reimbursement by the corporation of expenses incurred by a stockholder in soliciting proxies in connection with an election of directors, subject to the terms and conditions set forth in such bylaw. Section 113 does not, however, divest the board of directors of the broader power to manage and direct the expenditure of corporate funds and commitment of corporate resources in connection with meetings of stockholders. Rather, the adoption of Section 113 provides further evidence and support of the principle that a board cannot be divested of its managerial power unless that divestiture is expressly permitted by the General Corporation Law. In this regard, Section 113 only divests the board of directors of managerial authority relating to a subset of expenses to be incurred in connection with a meeting of stockholders. Furthermore, the board of directors, through its ability to amend the bylaws when such power is conferred in the certificate of incorporation, still retains some authority as it relates to any reimbursement obligation permissible under Section 113 of the General Corporation Law. *See* 8 *Del. C.* § 113 (providing, in relevant part, that such reimbursement obligation may be contingent upon, among other lawful conditions, "limitations on the amount of reimbursement based upon . . . the amount spent by the corporation in soliciting proxies in connection with the election").

authority to manage the business and affairs of the Company.[10] The Board's power and authority to manage the business and affairs of the Company extends to matters relating to the conduct of meetings of stockholders. For example, it is the Board, not the stockholders, who is granted the authority to determine a record date for the Annual Meeting under Section 213(a) of the General Corporation Law.[11] Similarly, the Board is vested with the authority to determine how and when notice of a meeting of stockholders should be given and what corporate resources should be expended in connection therewith.[12] Such decisions are reserved by statute to the discretion of the Board, not the stockholders.

Here, however, the Proposal would impermissibly impinge on the authority of the Board to determine whether to adjourn the Annual Meeting, how corporate funds should be expended and the stockholders entitled to notice of and to vote at potential adjournments of the Annual Meeting pursuant to the Proposal. As noted above, the Proposal mandates adjournment of the Annual Meeting (regardless of the views of the Board on the issue). Indeed, the Proposal requires that the Annual Meeting must continue to be adjourned each time it is reconvened if, at such time, there are not sufficient votes to approve the Proposal or the Amendments. As such, assuming that there are not sufficient votes to approve the Proposal or the Amendments at the Annual Meeting or successive adjournments thereof, the Proposal would repeatedly impinge on the Board's managerial authority in terms of the decision whether to adjourn the Annual Meeting

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[10] *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); *see also In re CNX Gas Corp. S'holders Litig.*, 2010 WL 2705147, at *10 (Del. Ch. July 5, 2010) ("the premise of board-centrism animates the General Corporation Law"); *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000) ("One of the fundamental principles of the Delaware General Corporation Law statute is that the business affairs of a corporation are managed by or under the direction of its board of directors.") (citing 8 *Del. C.* § 141(a)); *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291 (Del. 1998) ("One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation.").

[11] 8 *Del. C.* § 213(a) ("In order that the corporation may determine the stockholders entitled to notice of any meeting of stockholders or any adjournment thereof, *the board of directors* may fix a record date . . .") (emphasis added); *Empire of Carolina, Inc. v. Deltona Corp.*, 514 A.2d 1091, 1095 (Del. 1986) ("Subsection 213(a) thereby vests primary authority to fix a record date with the board of directors. This is consistent with the fundamental principle of Delaware Corporate Law that duly elected directors manage the business and affairs of the corporation.").

[12] *See Jones Apparel Gp., Inc. v. Maxwell Shoe Co., Inc.*, 883 A.2d 837, 851 n.38 (Del. Ch. 2004) ("Under the DGCL, it is the directors who in the first instance must decide when to give notice [of a meeting of stockholders], since it is they who, under § 141(a), manage the business and affairs of the corporation."); *Alessi v. Beracha*, 849 A.2d 939, 943 (Del. Ch. 2004) (finding that it would be "unreasonable" to infer that directors of a Delaware corporation were unaware of the corporation's program to reacquire its shares because of the directors' responsibility under Section 141(a) to oversee the expenditure of corporate funds).

and would require the Board to continue to expend significant additional corporate funds to adjourn and reconvene the meeting, regardless of whether doing so was determined by the Board to be advisable and in the best interests of the Company and all of its stockholders. In addition, if the Annual Meeting is adjourned and reconvened numerous times, because of "Section 213(a)'s requirement that the board or a board committee set the record date by resolution",[13] the Board would be required to fix a new record date for the adjourned meeting when the record date initially set for the Annual Meeting became stale as a result of successive adjournments.[14] Thus, the Proposal would require the Board to fix a new record date for the adjourned meeting,[15] regardless of whether fixing the new record date (and continuing to submit the Proposal or the Amendments to the stockholders) was advisable and in the best interests of the Company and its stockholders in the judgment of the Board.

Under Delaware law, directors cannot be directed by some percentage of the stockholders to enter into a contract or take an action that would prevent the board (or a committee thereof) from "completely discharging its fundamental management duties to the corporation and its stockholders."[16] Nor can a contract, bylaw or stockholder resolution "limit in a substantial way the freedom of director decisions on matters of management policy."[17] The Delaware courts have consistently applied these principles to prevent attempts to dictate future

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[13] *In re Staples, Inc. S'holders Litig.*, 792 A.2d 934, 964 (Del. Ch. 2001).

[14] *See High River Limited P'ship v. Dell Inc.*, C.A. No. 8762-CS (TRANSCRIPT) (Del. Ch. Aug. 16, 2013) (declining to find a colorable wrong in setting a new record date for a stockholder meeting given the "stale nature" of the prior record date); *In re The MONY Gp., Inc. S'holder Litig.*, 853 A.2d 661, 672 (Del. Ch. 2004) (approving the resetting of a "stale record date"); *Bryan v. W. Pac. R. Corp.*, 35 A.2d 909, 914-15 (Del. Ch. 1944) (enjoining a meeting of stockholders where the stock transfer books were closed almost eight months before the meeting); *Kurz v. Holbrook*, 989 A.2d 140, 178-79 (Del. Ch. 2010) *rev'd on other grounds*, *Crown EMAK P'rs, LLC v. Kurz*, 922 A.2d 377 (Del. 2010) (stating that "[w]hat legitimizes the stockholder vote as a decision-making mechanism is the premise that stockholders with economic ownership are expressing their collective view as to whether a particular course of action serves the corporate goal of stockholder wealth maximization" and noting that cases addressing the staleness of a record date reflect the Delaware courts' concerns about misalignment between the voting interest and economic interests of stockholders in connection with legitimating conditions necessary for meaningful stockholder voting).

[15] In addition to fixing a new record date, the Board would also be required to give notice of the adjourned meeting to each stockholder of record entitled to vote at such adjourned meeting as of the record date fixed for notice of such adjourned meeting. *See* 8 *Del. C.* § 222.

[16] *Quickturn*, 721 A.2d at 1291.

[17] *Abercrombie v. Davies*, 123 A.2d 893, 899 (Del. Ch. 1956).

conduct or decisions by directors, whether by contract, bylaw, stockholder resolution or otherwise.[18]

For example, in *Quickturn*, the Delaware Supreme Court invalidated a provision of a stockholder rights plan adopted by the company's board of directors, which prevented any newly elected board from redeeming the rights plan for six months, because the provision would "impermissibly deprive any newly elected board of both its statutory authority to manage the corporation [under the General Corporation Law] and its concomitant fiduciary duty pursuant to that statutory mandate."[19] Similarly, in *AFSCME*, the Delaware Supreme Court held that neither the board nor the stockholders of a Delaware corporation were permitted to adopt a bylaw provision that required future boards of directors to reimburse stockholders for the reasonable expenses they incurred in connection with a proxy contest.[20] The Court held that the proposed bylaw would impermissibly "prevent the directors from exercising their full managerial power in circumstances where their fiduciary duties would otherwise require them to deny reimbursement to a dissident slate."[21]

As in the *Quickturn* and *AFSCME* cases, the Proposal, if implemented, would impermissibly impinge on the Board's authority to determine whether to adjourn a meeting, to determine how corporate funds should be expended and to determine the record date for stockholders entitled to notice of and to vote at potential adjournments of the Annual Meeting pursuant to the Proposal. Additionally, as described more fully above, the Proposal, if implemented, could require the Board or the Chairperson to adjourn the Annual Meeting even in circumstances where their fiduciary duties would otherwise require them to decline to adjourn the Annual Meeting in order to solicit additional votes in favor of the approval of the Proposal or the Amendments. These decisions are no less fundamental to the Company than the decision not to redeem a stockholder rights plan addressed by the Delaware Supreme Court in *Quickturn* or to reimburse proxy expenses addressed by the Delaware Supreme Court in *AFSCME*.

Thus, because the Proposal would require the Board to adjourn the Annual Meeting, would require the Board to expend corporate funds on the adjournment of the Annual

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[18] *See Quickturn*, 721 A.2d at 1291; 8 *Del. C.* §141(a) ("The business and affairs of every corporation … shall be managed by or under the direction of a board of directors….").

[19] *Quickturn*, 721 A.2d at 1291.

[20] *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d. 227, 239 (Del. 2008).

[21] *Id.* As discussed in additional detail herein, Section 113 of the General Corporation Law, which was adopted after the *AFSCME* decision, specifically permits Delaware corporations to adopt bylaws providing for the reimbursement by the corporation of expenses incurred by a stockholder in soliciting proxies in connection with the election of directors. The adoption of Section 113, however, did not overrule the principles of common law adopted by the Delaware Supreme Court in *AFSCME*. Rather, as noted above, the adoption of Section 113 provides further evidence and support of the principle that a board cannot be divested of its managerial power unless that divestiture is expressly permitted by the General Corporation Law.

Meeting and the solicitation of further votes in favor of the approval of the Proposal or the Amendments and would at some point require the Board to fix a new record date for determining the stockholders entitled to notice of and to vote at the adjourned meeting, the Proposal would, if implemented, impermissibly impinge upon the authority of the Board under Sections 141(a) and 213 of the General Corporation Law and therefore violate Delaware law.

C. The Proposal, if Implemented, Would Impermissibly Require the Company to Solicit Votes to Approve the Proposal or the Amendments Even After the Polls Have Been Closed and the Right to Vote Thereon Has Been Terminated

Under Delaware law, the determination of whether a proposal has been validly approved at a meeting of stockholders cannot be made until the polls have been closed.[22] Once the polls have been closed, however, the right to vote on such proposal terminates.[23] Accordingly, the Delaware courts have repeatedly held that inspectors of election properly refuse to accept proxies submitted after the closing of the polls, leaving stockholders to bear responsibility for their failure to vote when the polls are open.[24] As such, once the polls have been closed on the Proposal or the Amendments and it has been determined whether there were sufficient votes necessary to approve the Proposal or the Amendments, the Company cannot then, assuming that there were not sufficient votes to approve the Proposal or the Amendments, re-open the polls on the Proposal or the Amendments and solicit additional votes in favor of the approval thereof. Therefore, since the Proposal would require the Annual Meeting to be adjourned to solicit additional votes necessary to approve the Proposal or the Amendments only after a determination that "votes for approval are lacking" and such a determination can only be definitively made after the polls are closed at the meeting and the right to vote thereon has been

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[22] *See Magill v. North American Refractories Co.*, 128 A.2d 233, 237 (Del. 1956) ("Until the polls are closed a stockholder may change his vote ...").

[23] *See Scherer v. R.P. Scherer Corp.*, 1988 WL 103311, at *8 (Del. Ch. Oct. 5, 1988) (holding that where "the polls had not closed" and "voting was still possible, including a withdrawal of its earlier vote" the trustee was obligated to withdraw the vote it had cast upon receiving a notice of an order of the Court of Appeals staying voting of the shares in question).

[24] *See* 8 *Del. C.* § 231(c) ("The date and time of the opening and the closing of the polls for each matter upon which the stockholders will vote at a meeting shall be announced at the meeting. No ballot, proxies or votes, nor any revocations thereof or changes thereto, shall be accepted by the inspectors after the closing of the polls unless the Court of Chancery upon application by a stockholder shall determine otherwise."); *Atterbury v. Consol. Coppermines Corp.*, 20 A.2d 743, 748 (Del. Ch. 1941) ("Where the Inspectors have closed the polls, counted the votes and announced the result of a vote, it is then too late to open the polls and receive the votes of any [stockholders] who have not voted."); *Concord Fin. Gp., Inc. v. Tri-State Motor Transit Co. of Del.*, 567 A.2d 1, 12 (Del. Ch. 1989) ("The polls were closed ... The Inspector had no authority to open the polls to permit [stockholders] to vote...").

terminated, the Proposal, if implemented, would violate Delaware law.

CONCLUSION

Based upon and subject to the foregoing and subject to the limitations stated herein, it is our opinion that the Proposal, if implemented, would violate Delaware law.

The foregoing opinion is limited to the laws of the State of Delaware. We have not considered and express no opinion on the laws of any other state or jurisdiction, including federal laws regulating securities or any other federal laws, or the rules and regulations of stock exchanges or of any other regulatory body.

The foregoing opinion is rendered solely for your benefit in connection with the matters addressed herein. We understand that you may furnish a copy of this opinion letter to the Securities and Exchange Commission and to the Proponent in connection with the matters addressed herein, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be furnished or quoted to, nor may the foregoing opinion be relied upon by, any other person or entity for any purpose without our prior written consent.

Very truly yours,

Richards, Layton & Finger, P.A.

MDA