



Christina Y. Lai  
Vice President, Corporate Legal Affairs  
and Corporate Secretary  
Applied Materials, Inc.  
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Santa Clara, California 95052  
Telephone: 408 563 0164  
christina\_lai@amat.com

November 4, 2019

**Via Electronic Mail to shareholderproposals@sec.gov**

U.S. Securities and Exchange Commission  
Division of Corporation Finance  
Office of Chief Counsel  
100 F Street, N.E.  
Washington D.C. 20549

Re: Applied Materials, Inc.  
Shareholder Proposal Submitted by Kenneth Steiner

Dear Sir or Madam:

In accordance with Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), Applied Materials, Inc., a Delaware corporation (the "**Company**"), hereby gives notice of the Company's intention to omit from its proxy statement for its 2020 annual meeting of shareholders (the "**2020 Proxy Statement**") a shareholder proposal (the "**Proposal**") submitted by Kenneth Steiner (the "**Proponent**") under cover of letter dated September 20, 2019 and received by the Company via email on September 23, 2019. A copy of the Proposal, together with the Proponent's statement, is attached hereto as **Exhibit A**.

The Company requests confirmation that the staff of the Division of Corporation Finance (the "**Staff**") of the Securities and Exchange Commission (the "**Commission**") will not recommend any enforcement action if the Company omits the Proposal from the 2020 Proxy Statement on the grounds that the Company has substantially implemented the Proposal within the meaning of Rule 14a-8(i)(10).

In accordance with Rule 14a-8(j), we are submitting this letter to the Commission no later than 80 calendar days before the Company expects to file its definitive 2020 Proxy Statement with the Commission. Pursuant to Staff Legal Bulletin No. 14D (CF), *Shareholder Proposals* (November 7, 2008), question C, we have submitted this letter and the related correspondence from the Proponent to the Commission via email to shareholderproposals@sec.gov. In accordance with Rule 14a-8(j) and the instructions contained in the letter accompanying the Proposal, a copy of this submission is being forwarded simultaneously to John Chevedden, the

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Proponent's listed contact. This letter constitutes the Company's statement of the reasons it deems the omission of the Proposal from the 2020 Proxy Statement to be proper.

## **I. The Proposal**

The Proposal requests that the Company's Board of Directors (the "**Board**") "undertake such steps as may be necessary to permit written consent by shareholders entitled to cast the minimum number of votes that would be necessary to authorize the action at a meeting at which all shareholders entitled to vote thereon were present and voting. This written consent is to be consistent with giving shareholders the fullest power to act by written consent consistent with applicable law. This includes shareholder ability to initiate any appropriate topic for written consent."

On October 2, 2019, within 14 days of the Company's receipt of the Proposal, the Company sent to the Proponent via email and overnight mail a notification of eligibility and procedural deficiencies with respect to the Proposal (the "**Deficiency Letter**"). The Proponent provided additional documentation in response to the Deficiency Letter on October 11, 2019 and October 16, 2019. Copies of the Deficiency Letter and all related correspondence are attached hereto as **Exhibit B**.

## **II. Basis for Exclusion**

In accordance with Rule 14a-8, we hereby respectfully request that the Staff confirm that no enforcement action will be recommended against the Company if, upon confirmation that the Company's Board has approved the Proposed Amendment to the Certification of Incorporation referred to below, the Proposal is omitted in its entirety from its 2020 Proxy Statement pursuant to Rule 14a-8(i)(10) because the Company has substantially implemented the Proposal.

### **A. Background**

The Company's Certificate of Incorporation (the "**Certificate of Incorporation**") currently provides that "[n]o action shall be taken by stockholders by written consent." At the Company's 2019 annual meeting of shareholders, the shareholders voted on a virtually identical proposal from the Proponent regarding shareholder action by written consent. Given the high level of shareholder support for the proposal (almost 50% of shares present and entitled to vote thereon) and at the direction of the Corporate Governance and Nominating Committee (the "**Committee**") of the Board, management reached out to shareholders owning more than a majority of the Company's outstanding shares to solicit their views on shareholder action by written consent. Feedback from this extensive shareholder outreach indicated broad support for a provision allowing shareholder action by written consent that would contain the procedural safeguards similar to the current right of the Company's shareholders to call a special meeting.

**B. *Expected Board Action***

At its December 6, 2019 meeting, the Board will consider, and is expected to approve, resolutions regarding an amendment of the Certificate of Incorporation to permit shareholder action by written consent (the “**Proposed Amendment**”), which would declare the Proposed Amendment advisable and in the best interest of the shareholders, direct that the Proposed Amendment be submitted to shareholders for adoption at the 2020 annual meeting of shareholders and recommend that shareholders vote to adopt the Proposed Amendment. The Committee has reviewed and discussed the shareholder feedback and adoption of shareholder action by written consent, and is expected to recommend that the Board approve the Proposed Amendment.

As currently contemplated, the Proposed Amendment would permit shareholders holding at least 20% of the Company’s outstanding common stock to request that the Board set a record date for shareholders to act by written consent in accordance with certain procedural requirements (similar to the ownership percentage and procedural requirements necessary to request a special meeting of shareholders). Pursuant to Section 228 of the General Corporation Law of the State of Delaware (the “**DGCL**”), upon adoption and approval of the Proposed Amendment, shareholders’ action would be approved if consents in writing provided to the Company represent at least the minimum number of votes that would be necessary to take the corporate action at a meeting at which all shares entitled to vote thereon were present and voted. The text of the Proposed Amendment will be included in a supplemental letter notifying the Staff of the Board’s action on this matter shortly after its meeting in December, as described below.

**C. *The Proposed Amendment Substantially Implements the Proposal Within the Meaning of Rule 14a-8(i)(10)***

*i. The Proposed Amendment Will Achieve the Essential Objective of 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 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**”). In the 1983 Release, the Commission expressed a revised interpretation to the rule to permit the omission of proposals that had been “substantially implemented,” and then 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 objective of a shareholder proposal, the Staff has concurred that the proposal has been “substantially implemented” and may be excluded as moot. *See, e.g., Bank of New York Mellon Corp.* (avail. Feb. 15, 2019); *Exelon Corp.* (avail. Feb. 26, 2010); *Exxon Mobil Corp. (Burt)* (avail. Mar. 23, 2009); *Anheuser-Busch Companies, Inc.* (avail. Jan. 17, 2007); *ConAgra Foods, Inc.* (avail. July 3, 2006); *Johnson & Johnson* (avail. Feb. 17, 2006); *Talbots Inc.* (avail. Apr. 5, 2002); *Exxon Mobil Corp.* (avail. Jan. 24, 2001); *Masco Corp.* (avail. Mar. 29, 1999); *The Gap, Inc.* (avail. Mar. 8, 1996).

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 the proposal’s essential objective. *See, e.g., Bank of New York Mellon Corp.* (avail. Feb. 15, 2019); *Wal-Mart Stores, Inc.* (avail. Mar. 27, 2014); *Exelon Corp.* (avail. Feb. 26, 2010); *Anheuser-Busch Cos., Inc.* (avail. Jan. 17, 2007); *ConAgra Foods, Inc.* (avail. July 3, 2006); *Johnson & Johnson* (avail. Feb. 17, 2006); *Talbots Inc.* (avail. Apr. 5, 2002); *Masco Corp.* (avail. Mar. 29, 1999).

In keeping with this interpretation, the Staff has concurred in the exclusion of shareholder proposals on the basis of substantial implementation despite additional conditions, limitations or requirements, not included in the proposal, being added by the company. In fact, as would be expected, companies that have substantially implemented a shareholder proposal that requires a bylaw or certificate amendment typically have addressed procedural issues or safeguards that are not addressed in the shareholder proposal but that are consistent with the underlying concerns and essential objectives of the shareholder proposal. The Staff has granted no-action relief on the basis of substantial implementation with respect to proposals requesting that a company’s board of directors take the necessary steps to amend the company’s governing documents to give shareholders a right to act by written consent when companies have included procedural requirements applicable to shareholders that exercise that right. *See, e.g. Gilead Sciences, Inc.* (avail. Mar. 6, 2019) and *Bank of New York Mellon Corp.* (avail. Feb. 15, 2019).

For example, in *Bank of New York Mellon Corp.*, a shareholder proposal, nearly identical to the Proposal and submitted by the same Proponent, requested that the company take such steps as may be necessary to permit action by written consent by shareholders by the minimum number of shares necessary to take action at a meeting at which all shareholders entitled to vote thereon were present and voting. The Staff concurred in the exclusion of the proposal on the basis that the company had substantially implemented the proposal following the board’s approval of a charter amendment that granted substantive rights that satisfied the essential objective of the proposal and contained certain stock ownership and procedural requirements not included in the shareholder proposal.

Similar to the company in *Bank of New York Mellon Corp.*, the Company is in the process of taking the actions necessary to implement the virtually identical proposal considered by its shareholders at the prior year's annual meeting. Because adoption of the amendment to the certificate of incorporation requires shareholder approval at a meeting of shareholders, the Company's 2020 annual meeting of shareholders will be the first opportunity for shareholders to take the action required to adopt the charter amendments necessary to permit shareholder action by written consent in accordance with the Proponent's proposal at the Company's 2019 annual meeting.

As in *Bank of New York Mellon Corp.*, the Proposed Amendment grants the substantive right requested in the proposal, and includes certain procedural requirements. Therefore, the Company believes that the Board's adoption of the Proposed Amendment will substantially implement the Proposal because the Proposed Amendment satisfies the essential objective of the Proposal: that the Board undertake steps as may be necessary to permit action by written consent by shareholders representing the minimum number of votes that would be necessary to take the corporate action at a meeting at which all shares entitled to vote thereon were present and voted.

*ii. The Board's Adoption of the Proposed Amendment Will Substantially Implement the Proposal*

Pursuant to Section 242(b) of the DGCL, implementing the Proposed Amendment requires that (1) the Board adopt a resolution setting forth the amendment proposed, declare its advisability and direct that the amendment be considered at the next annual meeting of shareholders and (2) shareholders approve the amendment. Since the Board is expected to adopt the Proposed Amendment as described above, the Company will have undertaken all of the steps within its power "as may be necessary to permit written consent by shareholders" and therefore, will have substantially implemented the Proposal.

The Staff has granted no-action relief under Rule 14a-8(i)(10) when a company has taken all of the steps within its power to permit the action requested by the proponent, but lacks the unilateral authority to adopt the necessary amendments to its governing documents. *See The Bank of New York Mellon Corp.* (avail. Feb. 15, 2019) (granting no action relief under Rule 14a-8(i)(10) where the company's board approved an amendment that would reduce the threshold required for shareholder action by written consent and submitted the proposal for shareholder approval at the next annual meeting); *The Southern Co.* (avail. Mar. 6, 2015) (granting no-action relief under Rule 14a-8(i)(10) where the company's board of directors approved a bylaw amendment that would remove a provision requiring unanimous written consent for shareholders to amend or repeal the bylaws and submitted the amendment for shareholder approval at the next annual meeting); *Omnicom Group, Inc.* (avail. Mar. 29, 2011) (granting no-action relief under Rule 14a-8(i)(10) where the company's board of directors approved an amendment to its

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governing documents that would allow shareholder action by written consent and submitted the amendment for shareholder approval at the next annual meeting).

Moreover, no-action relief under this Rule 14a-(i)(10) has been granted where a company represents that its board of directors is expected to take action that will substantially implement the proposal, and then supplements its request for no-action relief by notifying the Staff after that action has been taken by the board. *See, e.g., Gilead Sciences, Inc.* (avail. March 6, 2019); *The Southern Co.* (avail. Mar. 6, 2015); *NETGEAR, Inc.* (avail. Mar. 31, 2015); *Visa Inc.* (avail. Nov. 14, 2014); *Hewlett-Packard Co.* (avail. Dec. 19, 2013); *Starbucks Corp.* (avail. Nov. 27, 2012); *Applied Materials, Inc.* (avail. Dec. 19, 2008); *NiSource Inc.* (avail. Mar. 10, 2008); *General Motors Corp.* (avail. Mar. 3, 2004); *Intel Corp.* (avail. Mar. 11, 2003) (each granting no-action relief where the company notified the Staff of its intention to omit a shareholder proposal under Rule 14a-8(i)(10) because the board of directors was expected to take action that would substantially implement the proposal, and the company supplementally notified the Staff of the board action).

Accordingly, if the Board approves the Proposed Amendment, the Company will have substantially implemented the Proposal because it would have taken all of the steps within its power necessary to permit shareholder action by written consent in accordance with the Proposal's essential objective. As a result, the Company believes the Proposal may be omitted from its 2020 Proxy Statement in accordance with Rule 14a-8(i)(10).

### **III. Conclusion**

As stated above, on December 6, 2019, the Board is expected to approve the Proposed Amendment to its Certificate of Incorporation and to propose it for approval by its shareholders at its next annual meeting. The Company undertakes to supplementally notify the Staff after the Board acts on the Proposed Amendment.

In short, upon Board approval of the Proposed Amendment, the Board will have taken all steps to permit shareholder action by written consent and thereby will have achieved the "essential objective" of, and will have "substantially implemented," the Proposal. Accordingly, the Company respectfully submits that it may omit the Proposal from its 2020 Proxy Statement in accordance with Rule 14a-8(i)(10).

For the foregoing reasons, the Company respectfully requests that the Staff confirm that it will not recommend enforcement action if the Company omits the Proposal from its 2020 Proxy Statement.

If you have any questions or require any additional information, please do not hesitate to contact me at (408) 563-0164. If the Staff is unable to agree with our conclusions without

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additional information or discussions, we respectfully request the opportunity to confer with members of the Staff prior to issuance of any written response to this letter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Ch Y L', is positioned above the typed name.

Christina Y. Lai  
Vice President, Corporate Legal Affairs  
and Corporate Secretary

Enclosures

cc: John Chevedden, via email at \*\*\*  
Sandra L. Flow, Cleary Gottlieb Steen & Hamilton LLP

**Exhibit A**

The Proposal

See attached.

## To-Anh Nguyen

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**From:** \*\*\* >  
**Sent:** Monday, September 23, 2019 5:43 PM  
**To:** Christina Lai  
**Cc:** To-Anh Nguyen  
**Subject:** [External] Rule 14a-8 Proposal (AMAT)"  
**Attachments:** CCE23092019.pdf

CAUTION: EXTERNAL EMAIL. Verify before you click links or open attachments. Questions? Contact GIS.

Dear Ms. Lai,

Please see the attached rule 14a-8 proposal to improve corporate governance and enhance long-term shareholder value at de minimis up-front cost – especially considering the substantial market capitalization of the company.

Sincerely,

John Chevedden

Kenneth Steiner

\*\*\*

Ms. Christina Lai  
Corporate Secretary  
Applied Materials, Inc. (AMAT)  
3050 Bowers Ave  
Santa Clara CA 95052  
PH: 408 727-5555  
FX: 408 748-9943  
FX: 408-748-5119

Dear Ms. Lai,

I purchased stock in our company because I believed our company had potential for improved performance. 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 company 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

(PH:

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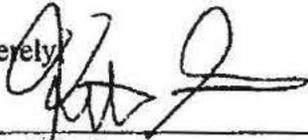
at:

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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 \*\*\*

Sincerely,



Kenneth Steiner

9-20-19

Date

cc: To-Anh Nguyen <To-Anh\_Nguyen@amat.com>  
PH: 408-727-5555  
FX: 408-748-5119

[AMAT: Rule 14a-8 Proposal, September 23, 2019]  
[This line and any line above it – *Not* for publication.]

**Proposal [4] – Shareholder Right to Act by Written Consent**

Shareholders request that our board of directors undertake such steps as may be necessary to permit written consent by shareholders entitled to cast the minimum number of votes that would be necessary to authorize the action at a meeting at which all shareholders entitled to vote thereon were present and voting. This written consent is to be consistent with giving shareholders the fullest power to act by written consent consistent with applicable law. This includes shareholder ability to initiate any appropriate topic for written consent.

Taking action by written consent in place of a special meeting is a means shareholders can use to raise important matters outside the normal annual meeting cycle and avoid the cost of a special meeting.

This proposal topic won majority shareholder support at 13 major companies in a single year. This included 67%-support at both Allstate and Sprint. Hundreds of major companies enable shareholder action by written consent. This proposal topic might have received a still higher vote than 67% at Allstate and Sprint if small shareholders had the same access to independent corporate governance data as large shareholders.

A proposal on this same topic won 48%-support from Applied Materials shareholders in 2019. If more shareholders had access to independent corporate governance data the near-majority 48%-vote would have been higher. This same proposal won 47% support in 2018 at United Rentals, Inc. (URI) and then it won majority support at URI in 2019.

Shareholders can act by written consent to elect a new director. This may be of greater importance since the board of directors approved \$6 billion of stock repurchases in 2018. Directors at some companies authorize stock buybacks because of personal incentives tied to short-term metrics, such as earnings per share, at the cost of long-term value creation. Also our Chairman of the Board received the highest negative votes of any AMAT director in 2019.

It is possible is that shareholders will not need to make use of this written consent because its mere existence will be an incentive factor that will help ensue that the company is well supervised by the Board of Directors and management.

Please vote yes:

**Shareholder Right to Act by Written Consent – Proposal [4]**

[The above line – *Is* for publication.]

Kenneth Steiner,

\*\*\*

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 [ \*\*\* ].

**Exhibit B**

Deficiency Letter and Related Correspondence

See attached.

**APPLIED MATERIALS.**

3050 Bowers Avenue  
Santa Clara, CA 95054-3299  
Phone: (408) 727-5555  
FAX: (408) 748-5119

Mailing Address:  
Applied Materials, Inc.  
P.O. Box 58039  
Santa Clara, CA 95052-8039

October 2, 2019

**Via Electronic and Overnight Mail**

Mr. John Chevedden  
\*\*\*

Dear Mr. Chevedden:

On September 23, 2019, Applied Materials, Inc. (the "Company") received an email from you submitting a shareholder proposal (the "Proposal") on behalf of Mr. Kenneth Steiner for inclusion in the Company's proxy materials for its 2020 Annual Meeting of Shareholders (the "Annual Meeting"). Mr. Steiner requested in the cover letter accompanying the Proposal (the "Letter") that all communications regarding the Proposal be directed to your attention.

The Proposal is governed by Rule 14a-8 under the Securities Exchange Act of 1934, as amended ("Rule 14a-8"), which sets forth the eligibility and procedural requirements for submitting shareholder proposals, as well as thirteen substantive bases under which companies may exclude such proposals. We have included a complete copy of Rule 14a-8 with this letter for your reference.

Based on our review of the information provided in your email, our records and regulatory materials, we are unable to conclude that the Proposal meets the requirements of Rule 14a-8. The Proposal contains certain procedural deficiencies, as set forth below, which Securities and Exchange Commission ("SEC") regulations require us to bring to your attention. Unless the deficiencies described below can be remedied in the proper time frame, as discussed below, the Company will be entitled to exclude the Proposal from its proxy materials for the Annual Meeting.

**Authority to Act on Behalf of Mr. Steiner**

We note that the Letter from Mr. Steiner appointed you as his "proxy" to act on his behalf with respect to the Proposal. The Division of Corporation Finance (the "Staff") of the SEC has published Staff Legal Bulletin No. 14I ("SLB 14I"), which provides guidance regarding the application of Rule 14a-8(b) when a shareholder submits a proposal through a proxy. We have included a copy of SLB 14I with this letter for your reference. Pursuant to SLB 14I, the Staff expects the documentation describing the shareholder's delegation of authority to the proxy to:

- "identify the shareholder-proponent and the person or entity selected as proxy;
- identify the company to which the proposal is directed;
- identify the annual or special meeting for which the proposal is submitted;
- identify the specific proposal to be submitted (e.g., proposal to lower the threshold for calling a special meeting from 25% to 10%); and
- be signed and dated by the shareholder."

The Letter does not identify the specific proposal to be submitted by you as the proxy for Mr. Steiner. As a result, the Company believes that the Letter does not meet the requirements of Rule 14a-8(b) and SLB 14I. Accordingly, if you wish to act as proxy for Mr. Steiner on the

Proposal, the Company respectfully requests that Mr. Steiner provide revised documentation describing Mr. Steiner's delegation of authority consistent with SLB 14I.

### **Proof of Share Ownership**

The Letter states that "[Mr. Steiner] will meet Rule 14a-8 requirements including the continuous ownership of the required stock value until after the date of the respective shareholder meeting." However, the Company has been unable to independently verify that Mr. Steiner is a registered or record holder of the Company's common stock. As a result, the Company believes that the Proposal does not meet the requirements of Rule 14a-8(b). Accordingly, the Company respectfully requests that you or Mr. Steiner submit verification of Mr. Steiner's ownership of the Company's common stock.

As required under Rule 14a-8(b), you or Mr. Steiner must provide the Company sufficient proof that Mr. Steiner has continuously held at least \$2,000 in market value, or 1%, of the Company's common stock for at least one year as of September 23, 2019, the date the Proposal was submitted. Under Rule 14a-8(b), you or Mr. Steiner may provide proof of ownership by submitting either:

- a written statement from the "record" holder of the shares (usually a broker or a bank) verifying that, as of the date the Proposal was submitted, Mr. Steiner continuously held the requisite number of shares of the Company's common stock for at least one year; or
- a copy of a filed Schedule 13D, Schedule 13G, Form 3, Form 4 and/or Form 5, and any amendments to those documents or updated forms, reflecting Mr. Steiner's ownership of the Company's common stock as of or before the date on which the one-year eligibility period begins and Mr. Steiner's written statement that he continuously held the required number of shares for the one-year period as of the date of the statement.

Please note that, to be considered a "record" holder for these purposes, the broker or bank providing a written statement verifying Mr. Steiner's ownership must be a Depository Trust Company ("DTC") participant or an affiliate of a DTC participant. As of the date of this letter, a list of DTC participants can be obtained at:

<http://www.dtcc.com/~media/Files/Downloads/client-center/DTC/alpha.ashx>

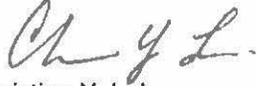
Under Rule 14a-8(f), a response that corrects the deficiencies described in this letter must be postmarked or transmitted electronically no later than 14 days from the date you receive this letter.

Once we receive your response, we will be in a position to determine whether the deficiencies described in this letter have been adequately and timely corrected and whether the Proposal is eligible for inclusion in the Company's proxy materials for the Annual Meeting. The Company reserves the right to submit a no-action request to the Staff of the SEC, as appropriate, with respect to the Proposal.

Mr. John Chevedden  
October 2, 2019  
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If you have any questions, please contact me at (408) 563-0164. Please address any response to me by email at christina\_lai@amat.com.

Sincerely,



Christina Y. Lai  
Vice President, Corporate Legal Affairs  
and Corporate Secretary

Enclosure

cc: Mr. Kenneth Steiner, via overnight mail

## **Rule 14a-8 – Proposals of Security Holders**

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.

\* \* \*

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

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

**Date:** November 1, 2017

**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 submitting a web-based request form at [https://www.sec.gov/forms/corp\\_fin\\_interpretive](https://www.sec.gov/forms/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 about the Division's views on:

- the scope and application of Rule 14a-8(i)(7);
- the scope and application of Rule 14a-8(i)(5);
- proposals submitted on behalf of shareholders; and
- the use of graphs and images consistent with Rule 14a-8(d).

You can find additional guidance about 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, SLB No. 14E, SLB No. 14F, SLB No. 14G and SLB No. 14H.

**B. Rule 14a-8(i)(7)**

**1. Background**

Rule 14a-8(i)(7), the "ordinary business" exception, is one of the substantive bases for exclusion of a shareholder proposal in Rule 14a-8. It permits a company to exclude a proposal that "deals with a matter relating to the company's ordinary business operations." The purpose of the exception 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."<sup>[1]</sup>

**2. The Division's application of Rule 14a-8(i)(7)**

The Commission has stated that the policy underlying the "ordinary business" exception rests on two central considerations.<sup>[2]</sup> The first relates to the proposal's subject matter; the second, the degree to which the proposal "micromanages" the company. Under the first consideration, proposals that raise matters that 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" may be excluded, unless such a proposal focuses on policy issues that are sufficiently significant because they transcend ordinary business and would be appropriate for a shareholder vote.<sup>[3]</sup> Whether the significant policy exception applies depends, in part, on the connection between the significant policy issue and the company's business operations.<sup>[4]</sup>

At issue in many Rule 14a-8(i)(7) no-action requests is whether a proposal that addresses ordinary business matters nonetheless focuses on a policy issue that is sufficiently significant. These determinations often raise difficult judgment calls that the Division believes are in the first instance matters that the board of directors is generally in a better position to determine. A board of directors, acting as steward with fiduciary duties to a company's shareholders, generally has significant duties of loyalty and care in overseeing management and the strategic direction of the company. A board acting in this capacity and with the knowledge of the company's business and the implications for a particular proposal on that company's business is well situated to analyze,

determine and explain whether a particular issue is sufficiently significant because the matter transcends ordinary business and would be appropriate for a shareholder vote. Accordingly, going forward, we would expect a company's no-action request to include a discussion that reflects the board's analysis of the particular policy issue raised and its significance. That explanation would be most helpful if it detailed the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned. We believe that a well-developed discussion of the board's analysis of these matters will greatly assist the staff with its review of no-action requests under Rule 14a-8(i)(7).

### **C. Rule 14a-8(i)(5)**

#### **1. Background**

Rule 14a-8(i)(5), the "economic relevance" exception, is one of the substantive bases for exclusion of a shareholder proposal in Rule 14a-8. It permits a company to exclude a proposal that "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."

#### **2. History of Rule 14a-8(i)(5)**

Prior to adoption of the current version of the exclusion in Rule 14a-8(i)(5), the rule permitted companies to omit any proposal that "deals with a matter that is not significantly related to the issuer's business." In proposing changes to that version of the rule in 1982, the Commission noted that the staff's practice had been to agree with exclusion of proposals that bore no economic relationship to a company's business, but that "where the proposal has reflected social or ethical issues, rather than economic concerns, raised by the issuer's business, and the issuer conducts any such business, no matter how small, the staff has not issued a no-action letter with respect to the omission of the proposal."<sup>[5]</sup> The Commission stated that this interpretation of the rule may have "unduly limit[ed] the exclusion," and proposed adopting the economic tests that appear in the rule today.<sup>[6]</sup> In adopting the rule, the Commission characterized it as relating "to proposals concerning the functioning of the economic business of an issuer and not to such matters as shareholders' rights, e.g., cumulative voting."<sup>[7]</sup>

Shortly after the 1983 amendments, however, the District Court for the District of Columbia in *Lovenheim v. Iroquois Brands, Ltd.*, 618 F. Supp. 554 (D.D.C. 1985) preliminarily enjoined a company from excluding a proposal regarding sales of a product line that represented only 0.05% of assets, \$79,000 in sales and a net loss of (\$3,121), compared to the company's total assets of \$78 million, annual revenues of \$141 million and net earnings of \$6 million. The court based its decision to grant the injunction "in light of the ethical and social significance" of the proposal and on "the fact that it implicates significant levels of sales." Since that time, the Division has interpreted *Lovenheim* in a manner that has significantly narrowed the scope of Rule 14a-8(i)(5).

#### **3. The Division's application of Rule 14a-8(i)(5)**

Over the years, the Division has only infrequently agreed with exclusion under the "economic relevance" exception. Under its historical application, the Division has not agreed with exclusion under Rule 14a-8(i)(5), even where a proposal has related to operations that accounted for less than 5% of total assets, net earnings and gross sales, where the company conducted business, no matter how small, related to the issue raised in the proposal. The Division's analysis has not focused on a proposal's significance to the company's business. As a result, the Division's analysis has been similar to its analysis prior to 1983, with which the Commission expressed concern.

That analysis simply considered whether a company conducted any amount of business related to the issue in the proposal and whether that issue was of broad social or ethical concern. We believe the Division's application of Rule 14a-8(i)(5) has unduly limited the exclusion's availability

because it has not fully considered the second prong of the rule as amended in 1982 – the question of whether the proposal “deals with a matter that is not significantly related to the issuer’s business” and is therefore excludable. Accordingly, going forward, the Division’s analysis will focus, as the rule directs, on a proposal’s significance to the company’s business when it otherwise relates to operations that account for less than 5% of total assets, net earnings and gross sales. Under this framework, proposals that raise issues of social or ethical significance may be included or excluded, notwithstanding their importance in the abstract, based on the application and analysis of each of the factors of Rule 14a-8(i)(5) in determining the proposal’s relevance to the company’s business.

Because the test only allows exclusion when the matter is not “otherwise significantly related to the company,” we view the analysis as dependent upon the particular circumstances of the company to which the proposal is submitted. That is, a matter significant to one company may not be significant to another. On the other hand, we would generally view substantive governance matters to be significantly related to almost all companies.

Where a proposal’s significance to a company’s business is not apparent on its face, a proposal may be excludable unless the proponent demonstrates that it is “otherwise significantly related to the company’s business.”<sup>[8]</sup> For example, the proponent can provide information demonstrating that the proposal “may have a significant impact on other segments of the issuer’s business or subject the issuer to significant contingent liabilities.”<sup>[9]</sup> The proponent could continue to raise social or ethical issues in its arguments, but it would need to tie those to a significant effect on the company’s business. The mere possibility of reputational or economic harm will not preclude no-action relief. In evaluating significance, the staff will consider the proposal in light of the “total mix” of information about the issuer.

As with the “ordinary business” exception in Rule 14a-8(i)(7), determining whether a proposal is “otherwise significantly related to the company’s business” can raise difficult judgment calls. Similarly, we believe that the board of directors is generally in a better position to determine these matters in the first instance. A board acting with the knowledge of the company’s business and the implications for a particular proposal on that company’s business is better situated than the staff to determine whether a particular proposal is “otherwise significantly related to the company’s business.” Accordingly, we would expect a company’s Rule 14a-8(i)(5) no-action request to include a discussion that reflects the board’s analysis of the proposal’s significance to the company. That explanation would be most helpful if it detailed the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned. In addition, the Division’s analysis of whether a proposal is “otherwise significantly related” under Rule 14a-8(i)(5) has historically been informed by its analysis under the “ordinary business” exception, Rule 14a-8(i)(7). As a result, the availability or unavailability of Rule 14a-8(i)(7) has been largely determinative of the availability or unavailability of Rule 14a-8(i)(5). Going forward, the Division will no longer look to its analysis under Rule 14a-8(i)(7) when evaluating arguments under Rule 14a-8(i)(5). In our view, applying separate analytical frameworks will ensure that each basis for exclusion serves its intended purpose.

We believe the approach going forward is more appropriately rooted in the intended purpose and language of Rule 14a-8(i)(5), and better helps companies, proponents and the staff determine whether a proposal is “otherwise significantly related to the company’s business.”

#### **D. Proposals submitted on behalf of shareholders**

While Rule 14a-8 does not address shareholders’ ability to submit proposals through a representative, shareholders frequently elect to do so, a practice commonly referred to as “proposal by proxy.” The Division has been, and continues to be, of the view that a shareholder’s submission by proxy is consistent with Rule 14a-8.<sup>[10]</sup>

The Division is nevertheless mindful of challenges and concerns that proposals by proxy may present. For example, there may be questions about whether the eligibility requirements of Rule 14a-8(b) have been satisfied. There have also been concerns raised that shareholders may not know that proposals are being submitted on their behalf. In light of these challenges and concerns, and to help the staff and companies better evaluate whether the eligibility requirements of Rule 14a-8(b) have been satisfied, going forward, the staff will look to whether the shareholders who submit a proposal by proxy provide documentation describing the shareholder's delegation of authority to the proxy.[11] In general, we would expect this documentation to:

- identify the shareholder-proponent and the person or entity selected as proxy;
- identify the company to which the proposal is directed;
- identify the annual or special meeting for which the proposal is submitted;
- identify the specific proposal to be submitted (e.g., proposal to lower the threshold for calling a special meeting from 25% to 10%); and
- be signed and dated by the shareholder.

We believe this documentation will help alleviate concerns about proposals by proxy, and will also help companies and the staff better evaluate whether the eligibility requirements of Rule 14a-8(b) have been satisfied in connection with a proposal's submission by proxy. Where this information is not provided, there may be a basis to exclude the proposal under Rule 14a-8(b).[12]

## **E. Rule 14a-8(d)**

### **1. Background**

Rule 14a-8(d) is one of the procedural bases for exclusion of a shareholder proposal in Rule 14a-8. It provides that a "proposal, including any accompanying supporting statement, may not exceed 500 words."

### **2. The use of images in shareholder proposals**

Questions have recently arisen concerning the application of Rule 14a-8(d) to proposals that include graphs and/or images.[13] In two recent no-action decisions,[14] the Division expressed the view that the use of "500 words" and absence of express reference to graphics or images in Rule 14a-8(d) do not prohibit the inclusion of graphs and/or images in proposals.[15] Just as companies include graphics that are not expressly permitted under the disclosure rules, the Division is of the view that Rule 14a-8(d) does not preclude shareholders from using graphics to convey information about their proposals.[16]

The Division recognizes the potential for abuse in this area. The Division believes, however, that these potential abuses can be addressed through other provisions of Rule 14a-8. For example, exclusion of graphs and/or images would be appropriate under Rule 14a-8(i)(3) where they:

- make the proposal materially false or misleading;
- render the proposal so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing it, would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires;
- directly or indirectly impugn character, integrity or personal reputation, or directly or indirectly make charges concerning improper, illegal, or immoral conduct or association, without factual foundation; or
- are irrelevant to a consideration of the subject matter of the proposal, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which he or she is being asked to vote.[17]

Exclusion would also be appropriate under Rule 14a-8(d) if the total number of words in a proposal, including words in the graphics, exceeds 500.

[1] Release No. 34-40018 (May 21, 1998).

[2] *Id.*

[3] *Id.*

[4] See Staff Legal Bulletin No. 14H (Oct. 22, 2015), *citing* Staff Legal Bulletin No. 14E (Oct. 27, 2009) (stating that a proposal generally will not be excludable “as long as a sufficient nexus exists between the nature of the proposal and the company”).

[5] Release No. 34-19135 (Oct. 14, 1982).

[6] *Id.*

[7] Release No. 34-20091 (Aug. 16, 1983).

[8] Proponents bear the burden of demonstrating that a proposal is “otherwise significantly related to the company’s business.” See Release No. 34-39093 (Sep. 18, 1997), *citing* Release No. 34-19135.

[9] Release No. 34-19135.

[10] We view a shareholder’s ability to submit a proposal by proxy as largely a function of state agency law provided it is consistent with Rule 14a-8.

[11] This guidance applies only to proposals submitted by proxy after the date on which this staff legal bulletin is published.

[12] Companies that intend to seek exclusion under Rule 14a-8(b) based on a shareholder’s failure to provide some or all of this information must notify the proponent of the specific defect(s) within 14 calendar days of receiving the proposal so that the proponent has an opportunity to cure the defect. See Rule 14a-8(f)(1).

[13] Rule 14a-8(d) is intended to limit the amount of space a shareholder proposal may occupy in a company’s proxy statement. See Release No. 34-12999 (Nov. 22, 1976).

[14] *General Electric Co.* (Feb. 3, 2017, *recon. granted* Feb. 23, 2017); *General Electric Co.* (Feb. 23, 2016).

[15] These decisions were consistent with a longstanding Division position. See *Ferrofluidics Corp.* (Sep. 18, 1992).

[16] Companies should not minimize or otherwise diminish the appearance of a shareholder’s graphic. For example, if the company includes its own graphics in its proxy statement, it should give similar prominence to a shareholder’s graphics. If a company’s proxy statement appears in black and white, however, the shareholder proposal and accompanying graphics may also appear in black and white.

[17] See *General Electric Co.* (Feb. 23, 2017).

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**Ameritrade**

10/10/2019

Kenneth Steiner  
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Re: Your TD Ameritrade Account Ending in \*\*\* in 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 close of business on October 9, 2019, you have continuously held no less than 500 shares of each of the following stocks in the above referenced account since October 1, 2017.

Nuance Communications Inc (NUAN)  
Amerisourcebergen Corp (ABC)  
Applied Materials (AMAT)

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,

Andrew P. Haag  
Resource Specialist  
TD Ameritrade

This information is furnished as part of a general information service and TD Ameritrade shall not be liable for any damages arising out of any inaccuracy in the information. Because this information may differ from your TD Ameritrade monthly statement, you should rely only on the TD Ameritrade monthly statement as the official record of your TD Ameritrade account.

Market volatility, volume, and system availability may delay account access and trade executions.

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Kenneth Steiner

\*\*\*

Ms. Christina Lai  
Corporate Secretary  
Applied Materials, Inc. (AMAT)  
3050 Bowers Ave  
Santa Clara CA 95052  
PH: 408 727-5555  
FX: 408 748-9943  
FX: 408-748-5119

Dear Ms. Lai,

I purchased stock in our company because I believed our company had potential for improved performance. 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 company performance.

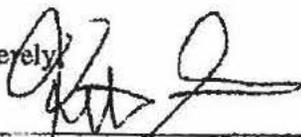
My proposal is for the next annual shareholder meeting. I will meet Rule 14a-8 requirements including the continuous ownership of the required stock value until after the date of the respective shareholder meeting. My submitted format, with the shareholder-supplied emphasis, is intended to be used for 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

(PH: \*\*\* ) at:

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

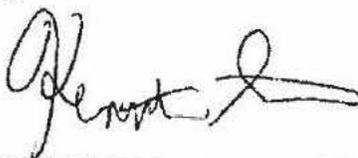
This letter does not cover proposals that are not rule 14a-8 proposals. This letter does not grant the power to vote. Your consideration and the consideration of the Board of Directors is appreciated in support of the long-term performance of our company. Please acknowledge receipt of my proposal promptly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

Sincerely,

  
Kenneth Steiner

9-20-19  
Date

cc: To-Anh Nguyen <To-Anh\_Nguyen@amat.com>  
PH: 408-727-5555  
FX: 408-748-5119

  
Proposal [4] - Shareholder Right to Act by Written Consent

10-16-2019