January 4, 2020

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

# 1 Rule 14a-8 Proposal
Honeywell International (HON)
Let Shareholders Vote [non-binding] on Bylaw Amendments [after the fact]
John Chevedden

Ladies and Gentlemen:

This is in regard to the December 23, 2019 no-action request.

The resolved statement said:
“Shareholders request that the Board of Directors amend the bylaws to require that any amendment to bylaws that is approved by the board shall be subject to a non-binding shareholder vote as soon as practical unless such amendment is already subject to a binding shareholder vote.”

To which the company responds with its non sequitur, starting at the last line of page 3:
“Under a plain reading of the Proposal, the effectiveness of any amendment to the Company’s By-laws (the ‘By-Laws’) is delayed until a stockholder vote is held.”

According to the pseudo logic of the no action request the largest executive paychecks would gather dust until after the say on pay vote at each annual meeting. If this logic was correct it might be considered appalling by the executives at companies that have say on pay votes once in 3-years – about 10% of companies.

This is to request that the Securities and Exchange Commission allow this resolution to stand and be voted upon in the 2019 proxy.

Sincerely,

[Signature]

John Chevedden

cc: Su Ping Lu <Suping.Lu@Honeywell.com>

Shareholders request that the Board of Directors amend the bylaws to require that any amendment to bylaws that is approved by the board shall be subject to a non-binding shareholder vote as soon as practical unless such amendment is already subject to a binding shareholder vote.

It is important that bylaw amendments take into consideration the impact that such amendments can have on reducing the accountability of directors and managers and/or on limiting the rights of shareholders. For example, Directors could adopt a narrowly crafted exclusive forum bylaw to suit the unique circumstances of the company.

A proxy advisor recently adopted a policy to vote against directors who unilaterally adopt bylaw provisions or amendments to the articles of incorporation that materially diminish shareholder rights.

Our directors could be neutral on this proposal to obtain feedback from shareholders without interference. However if our directors oppose this proposal then it would be useful for our directors to give recent examples of companies whose directors took the initiative and adopted bylaws that primarily benefitted shareholders.

Please vote yes:

Let Shareholders Vote on Bylaw Amendments – Proposal [4]

[The above line – Is for publication.]
December 23, 2019

Via Email to shareholderproposals@sec.gov

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

Omission of Shareholder Proposal Submitted by John Chevedden

Ladies and Gentlemen:

Honeywell International Inc. (“Honeywell” or the “Company”) has received from John Chevedden (the “Proponent”) a shareholder proposal (“Shareholder Proposal” or the “Proposal”) dated October 16, 2019 (the “Original Proposal”) and revised November 16, 2019 (the “Revised Proposal”), for inclusion in the Company’s proxy statement and form of proxy (the “2020 Proxy Materials”) for its 2020 Annual Meeting of Shareholders (the “2020 Annual Meeting”). Honeywell seeks to omit the Shareholder Proposal from its 2020 Proxy Materials pursuant to Rule 14a-8(i)(2), Rule 14a-8(i)(7) and Rule 14a-8(i)(3) of the Exchange Act. As Honeywell’s counsel we respectfully request on Honeywell’s behalf the concurrence of the staff of the Division of Corporation Finance (the “Staff”) of the U.S. Securities and Exchange Commission (the “Commission”) that no enforcement action will be recommended if the Company omits the Shareholder Proposal from the 2020 Proxy Materials.

In accordance with Rule 14a-8(j) of the Exchange Act, we have:

• Concurrently sent a copy of this correspondence to the Proponent; and

• Submitted this letter and its attachments not less than 80 days before the Company files its definitive 2020 Proxy Materials with the Commission, since the Company expects to file its definitive 2020 Proxy Materials with the Commission on or around March 12, 2020.
By copy of this letter, we notify the Proponent of the Company’s intention to omit the Shareholder Proposal from the 2020 Proxy Materials. We agree to promptly forward to the Proponent any Staff response to this no-action request that the Staff transmits to us. Rule 14a-8(k) of the Exchange Act and Question E of Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“SLB 14D”) provides that proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Staff. Accordingly, we are taking this opportunity to inform the Proponent that if the Proponent elects to submit additional correspondence to the Staff with respect to the Proponent’s Shareholder Proposal, a copy of that correspondence should concurrently be furnished to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) of the Exchange Act and Question E of SLB 14D.

This letter is being submitted electronically pursuant to Question C of SLB 14D. We are e-mailing this letter, including the Proposal and related supporting statements (the “Supporting Statement”), as well as related correspondence from the Proponent, attached as Exhibit A, to the Staff at shareholderproposals@sec.gov.

THE SHAREHOLDER PROPOSAL

The Revised Proposal states:

“Shareholders request that the Board of Directors amend the by-laws to require that any amendment to by-laws that is approved by the board shall be subject to a non-binding shareholder vote as soon as practical unless such amendment is already subject to a binding shareholder vote.”

A copy of the Original Proposal and the Revised Proposal, dated October 16, 2019 and revised November 16, 2019, respectively, as well as related supporting statements, is 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 properly be excluded from the 2020 Proxy Materials pursuant to:

- Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate Delaware law;

- Rule 14a-8(i)(7) because the Proposal relates to the ordinary business operations of the Company’s Board of Directors and seeks to micromanage the Company; 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)(2) Because Implementation Of 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 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 Morris, Nichols, Arsh & Tunnell LLP regarding Delaware law (the “Delaware Law Opinion”), we believe 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.

A. Background.

On numerous occasions, the Staff has concurred in exclusion of stockholder proposals where the proposal, if implemented, would, according to a legal opinion signed by counsel, be inconsistent with the company’s certificate of incorporation, thereby violating state law. For example, in Advanced Photonix, Inc. (avail. May 15, 2014), a proposal requested the adoption of a proxy access by-law that could only be amended by a vote of stockholders. The submitted legal opinion asserted that the company’s certificate of incorporation did “not limit in any respect the [b]oard’s power to amend the By-Laws, and therefore, the [c]ertificate mandate[d] that any part of the By-Laws [could] be amended by the [b]oard.” The Staff granted no-action relief under Rule 14a-8(i)(2), noting the opinion of counsel that “implementation of the proposal would cause [the company] to violate state law because the proposed by-law would conflict with [the company’s] certificate of incorporation.” See also CVS Caremark Corp. (avail. Mar. 9, 2010, recon. denied Mar. 17, 2010) (concurring in exclusion of a proposal seeking a by-law amendment that would require the board chair to be an independent director and could only be amended by stockholders because such a provision would conflict with the certificate of incorporation, which gave the board authority to amend the by-laws); Weirton Steel Corp. (avail. Mar. 14, 1995) (concurring in exclusion under the predecessor to Rule 14a-8(i)(2) of a proposal requesting an amendment to the by-laws requiring independent director vacancies to be filled by an election of stockholders where the certificate called for board vacancies to be filled solely by a vote of directors); Radiation Care Inc. (avail. Dec. 22, 1994) (concurring in exclusion under the predecessor to Rule 14a-8(i)(2) of a proposed by-law amendment establishing a three-member committee of shareholder representatives to review board activities, among other things noting that “there is a substantial question as to whether, under Delaware law, the directors may adopt a by-law provision that specifies that it may be amended only by shareholders.”).

B. If Implemented, the Proposal Would Violate Delaware Law Because It Contradicts the Certificate of Incorporation

Here, the Proposal requests that the Company’s Board of Directors (the “Board”) “amend the bylaws to require that any amendment to bylaws that is approved by the board shall be subject to a non-binding shareholder vote as soon as practical unless such amendment is already subject to a binding shareholder vote.” Under a plain reading of the Proposal, the effectiveness of
any amendment to the Company’s By-laws (the “By-Laws”) is delayed until a stockholder vote is held. As such, if implemented, the Proposal would violate Delaware law because the proposed By-law provision would limit the unqualified power granted by the Certificate of Incorporation for the Board to unilaterally make, amend, supplement or repeal the By-laws.

As discussed in the Delaware Law Opinion, by-laws contradicting the certificate of incorporation are invalid and a “nullity” under the Delaware General Corporation Law (“DGCL”). See Gaskill v. Gladys Belle Oil Co., 146 A. 337, 340 (Del. Ch. 1929); see also Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1189 (Del. 2010) (“It is settled Delaware law that a by-law that is inconsistent with the corporation’s charter is invalid.”). More specifically, the Delaware Supreme Court has invalidated a by-law that purported to restrict the unqualified power of the directors to adopt future by-law amendments. In Centaur Partners, IV v. National Intergroup, Inc., 582 A.2d 923, 929 (Del. 1990), the Delaware Supreme Court held that a proposed by-law amendment to fix the size of the board at a specific number was invalid because it was “clearly ‘inconsistent with’ the directors’ power to enlarge the board without limit” based on the directors’ “general authority to adopt or amend the corporate by-laws” under the company’s certificate of incorporation (emphasis added).1

Article Eight of the Company’s Certificate of Incorporation provides that “[t]he Board of Directors may from time to time make, amend, supplement or repeal the By-laws.” The Certificate of Incorporation does not provide that a Board-adopted By-law amendment can be conditioned on a prior non-binding stockholder vote, nor does the Certificate of Incorporation permit a By-law amendment to be somehow repealed if there is no after-the-fact non-binding stockholder vote.2 Therefore, just like the proposal in Centaur Partners, the Proposal if adopted conflicts with the Certificate of Incorporation and is thus illegal under Delaware law.

We are aware that the Staff previously was unable to concur in exclusion under Rule 14a-8(i)(2) of a similar proposal in FedEx Corp. (avail. July 3, 2018). However, the Proposal is clearly distinguishable from the proposal considered in FedEx Corp. Specifically, in FedEx Corp., the proposal requested that FedEx’ board of directors “take the steps necessary to include text in the company by-laws that states that each by-law amendment that is adopted by the [b]oard of [d]irectors shall not become effective until approved by shareholders” (emphasis added). While FedEx’ certificate of incorporation similarly vested in its board unilateral authority to amend its by-laws, the Staff appeared to have agreed with the proponent’s claim that the proposal’s request for FedEx’ board to “take the steps necessary” encompassed, as a first

---

1 Although not quoted in the opinion, the certificate provision in Centaur that conferred by-law amendment power on the board is very similar to the Company’s Certificate. See Restated Certificate of Incorporation of National Intergroup, Inc., Article SEVENTH (“In furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized to make, alter or repeal the by-laws of the Corporation.”) (publicly filed with the Secretary of State of the State of Delaware on March 18, 1983).

2 Under Article Eight of the Certificate of Incorporation, the stockholders can later adopt their own binding amendment to repeal a Board-adopted by-law, but that later stockholder action would be unrelated to the Board’s amendment. In other words, the Board’s By-law amendment would have immediate effect, with no other requirements imposed on the Board. The stockholders must take a later, separate action to repeal the Board’s amendment.
step, amending the company’s *certificate of incorporation* to remove such unilateral authority. In addition, FedEx’ certificate of incorporation empowered the board to make, alter, amend and repeal the by-laws “except so far as the [by-laws] adopted by the stockholders shall otherwise provide.” Here, however, the Proposal simply asks the Board to adopt a By-law amendment that would require stockholder vote before any (presumably future) By-law amendment can become effective. Unlike in *FedEx Corp.*, the Proposal does not contain any language that contemplates or suggests that an amendment to the Certificate of Incorporation limiting the Board’s ability to adopt, amend, or repeal the By-laws should be adopted first, prior to implementation of the Proposal nor does the Certificate of Incorporation include any limitations on or qualifications to the Board’s authority to adopt, amend, or repeal the By-laws that are similar to those in *FedEx Corp.* Therefore, as confirmed by the Delaware Law Opinion, the Proposal violates Delaware law.

**C. If Implemented, the Proposal Would Violate Delaware Law Because It Forces the Company to Include Non-Binding Stockholder Votes in the Company’s Proxy Materials**

The Proposal, if adopted, would also violate Delaware law because it would force the Board, in the future, to indiscriminately expend Company funds to place non-binding proposals in the Company’s proxy materials.\(^3\) As explained in the Delaware Law Opinion, under Delaware law, a corporation cannot be required to include in its proxy materials proposals that are selected in the indiscriminate manner as would be required by the Proposal. In *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008), the Delaware Supreme Court held a proposed by-law invalid because it conflicts with the directors’ fiduciary duty to decide in each specific case if the action the by-law requires is neutral or adverse to the interests of the corporation and thus must be forestalled. Similarly, the Proposal, if adopted, would compromise the directors’ fiduciary duty to decide in each specific case whether presenting a By-law amendment for a stockholder vote is in the interests of the corporation. As discussed in Section II below, the Proposal would require the Company to incur the expense and distraction of including in its proxy materials a stockholder proposal seeking a non-binding straw vote on every By-law amendment, indiscriminate of how administrative, minuscule, or mundane, and even if no stockholder and no director supports having a vote on such an amendment. Therefore, the Proposal if adopted conflicts with the directors’ fiduciary duty and is thus illegal under Delaware law.

Accordingly, we believe that the Proposal is excludable under Rule 14a-8(i)(2) because, as explained in the Delaware Law Opinion and as discussed above, implementation of the Proposal would cause the Company to violate Delaware law.

**II. The Proposal May Be Excluded Under Rule 14-8(i)(7) Because The Proposal Involves Matters Related To The Company’s Ordinary Business Operations.**

The Proposal may also properly be excluded from the 2020 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal relates to the Company’s ordinary business operations and

---

\(^3\) As detailed in Section III below, the Proposal is vague and allows for an alternative reading in addition to the plain reading. Under either reading, it would violate Delaware law if implemented.
does not focus on a significant policy issue that transcends the Company’s ordinary business operations. Additionally, the Proposal may also be excluded under Rule 14a-8(i)(7) because it seeks to micromanage the Company.

A. Background.

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)).

B. The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Relates To Procedures The Board Of Directors Uses To Administer Its Oversight Of The Company.

The Staff has concurred in exclusion of proposals under Rule 14a-8(i)(7) as ordinary business where the proposal related to the procedures a board of directors uses to administer its oversight of the company. For instance, in Naugatuck Valley Financial Corp. (avail. Feb. 28, 2013), the Staff concurred in exclusion of a proposal requesting that the company’s board of directors consider amending the by-laws so that the board would hold monthly meetings to carry out the company’s affairs. The company argued that the board, as part of its ordinary business, “determines the processes and procedures necessary to ensure proper oversight of the [c]ompany” and that the proposal was “an attempt to substitute the [s]hareholder’s personal view on how best to oversee and conduct this ordinary business activity” relating to the procedures used by the board of director to administer oversight of the company. In addition, the Staff has repeatedly concurred in exclusion of proposals requesting the board of directors to take certain actions relating to the board’s oversight of the company. See Amazon.com, Inc. (W. Andrew Mims Trust) (avail. Mar. 28, 2019) (concurring in exclusion of a proposal requesting the company to establish a societal risk oversight committee of the board to provide ongoing review of corporate policies and procedures and offer guidance on strategic decisions); McDonald’s Corp. (avail. Mar. 12, 2019) (concurring in exclusion of a proposal requesting a special board committee on food integrity); Wells Fargo & Co. (avail. Feb. 27, 2019) (concurring in exclusion of a proposal urging the board to allow for an employee representative on the company’s Stakeholder Advisory Council); The AES Corp. (avail. Jan. 9, 2007) (concurring in exclusion of a proposal requesting the creation of an ethics oversight committee to monitor the company’s
business practices to ensure compliance with applicable laws, rules, and regulations of the federal, state, and local governments and the company’s code of business conduct and ethics; and Monsanto Co. (avail. Nov. 3, 2005) (concurring in exclusion of a proposal calling for an ethics oversight committee of independent directors to ensure compliance with the company’s code of conduct and applicable laws); Ohio Edison Co. (avail. Feb. 8, 1991) (concurring in exclusion of a proposal requesting an amendment to the company’s articles of incorporation to require shareholder approval of any capital or construction expenditures after a certain aggregate threshold was exceeded, with the Staff noting that once the threshold was surpassed, the company “would be required to submit each and every proposed capital or construction expenditure to a shareholder vote, regardless of the size or nature of the proposed expenditure”).

Here, the Proposal requests that the Board “amend the bylaws to require that any amendment to the By-laws that is approved by the Board shall be subject to a non-binding shareholder vote as soon as practical unless such amendment is already subject to a binding shareholder vote.” In other words, the Proposal, plainly read, would require that any amendment to the By-laws—substantive or non-substantive—be subject to stockholder vote before it could be effective. Although the Proposal allows for non-binding stockholder votes “as soon as practical”, it still requires every By-law amendment to be subject to a stockholder vote.

This additional requirement interferes with the procedures the Board uses to administer its oversight of the Company. The Board has express authority to review and amend the By-laws, a means by which the Board administers its oversight of the Company. This authority falls squarely within the purview of the Board as specified in paragraph four of the Eighth Article of the Certificate of Incorporation which states that “[t]he Board of Directors may from time to time make, amend, supplement or repeal the By-laws.” In other words, the Certificate of Incorporation has already determined the procedures for how best to enable the Board to administer its oversight of the Company in this regard. Implementing the Proposal would supplant the Board’s judgment and discretion on ordinary business matters related to the procedures that the Board uses to administer its oversight of the Company by making these types of decisions subject to stockholder vote.

In addition, because the Proposal relates to any Board-approved By-law amendment (rather than a specific type of amendment), it is similar to the proposal in Naugatuck in that the Proposal would interfere with the Board’s administrative responsibilities. The broad scope of the Proposal could, for an indefinite period of time, prevent the Board from enacting effective By-law amendments, with no exceptions or carve outs accounting for the nature of the amendment, no matter how administrative, minuscule, or mundane such amendment might be. Moreover, seeking a stockholder vote on every By-law amendment, including purely administrative changes, such as non-substantive clean-up changes or technical changes to update the By-laws for Delaware law developments, would necessarily consume the Board’s and the Company’s time and resources, the allocation of which should be squarely within the purview of the Board and the Company’s management. Furthermore, the Proposal’s requirement would likely deter the Board from implementing what may otherwise be advisable amendments to the By-laws due to

---

the added administrative hurdles associated with obtaining a stockholder vote. Because the Proposal hampers the Board’s ability to execute its administrative responsibilities, the Proposal may properly be excluded under Rule 14a-8(i)(7).


The Proponent has not set forth any argument that the Proposal touches on a significant policy issue that transcends the day-to-day business matters or raises policy issues so significant that it would be appropriate for a shareholder vote. The Supporting Statement only suggests that By-law amendments by the Board could limit the rights of shareholders. However, the Certificate of Incorporation and Delaware law already anticipate this argument. Specifically, the Certificate of Incorporation and Section 109 of the DGCL give the Company’s shareholders the right to amend By-laws by vote, such that there can be no transcendent social issue raised by the Proposal on its face; the right of shareholders to amend the By-laws already exists. Furthermore, because the Proposal applies broadly to encompass purely administrative, technical, and immaterial By-law amendments that do not raise any significant policy implications—and are part of the procedures by which the Board administers its oversight of the Company—the Proposal remains excludable under Rule 14a-8(i)(7). Thus, while the amendments referenced in the Proposal may be read to implicate certain governance and stockholder rights issues (which are typically not excludable as ordinary business), the existing provisions of the Certificate of Incorporation and the DGCL and the overbroad nature of the Proposal (including any and all amendments to the By-laws, without regard to the nature of the amendment, no matter how administrative, minuscule, or mundane) rebut any consideration of the Proposal as raising transcendent policy issues. Given that there are no parameters or limitations in the Proposal or the Supporting Statement as to which By-law amendments would be subject to stockholder vote, the Proposal necessarily encompasses ordinary business matters relating to the procedures the Board uses to administer its oversight of the Company that do not touch on significant policy issues. Accordingly, because of the Proposal’s overbroad nature and the existing protections in the Certificate of Incorporation and the DGCL for shareholders to amend the By-laws, even if the Proposal could arguably touch upon a significant policy issue, it does not focus on any significant policy issues that would transcend ordinary business and is therefore properly excludable under Rule 14a-8(i)(7).

---

5 Article EIGHTH, paragraph four provides: “The Board of Directors may from time to time make, amend, supplement or repeal the Bylaws; provided, however, that the stockholders may change or repeal any By-law adopted by the Board of Directors.”

6 Additionally, the Company notes that it is not aware of any precedent in which the Staff has concluded that proposals implicating all types of amendments to a company’s by-laws, with no limitation as to the types of by-law amendments, focus on a significant policy issue.

7 The Staff has recognized that these types of overbroad proposals are excludable under Rule 14a-8(i)(7), even where the proposals reference significant policy issues. For example, in Amazon.com (Domini Impact Equity Fund) (avail. Mar. 28, 2019), the proposal requested that the board annually report to shareholders “its analysis of the community impacts of [the company’s] operations, considering near- and long-term local economic and social outcomes, including risks, and the mitigation of those risks, and opportunities arising from its presence in
D. The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Seeks To Micromanage The Company.

As discussed above, the Commission stated in the 1998 Release that one of the considerations underlying the ordinary business exclusion is “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.” The 1998 Release further states that “[t]his consideration may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.” In addition, Staff Legal Bulletin No. 14K (Oct. 16, 2019) (“SLB 14K”) clarified that in considering arguments for exclusion based on micromanagement, the Staff looks to see “whether the proposal . . . imposes a specific strategy, method, action, outcome or timeline for addressing an issue, thereby supplanting the judgment of management and the board”. Furthermore, the Staff noted that if a proposal “potentially limit[s] the judgment and discretion of the board and management, the proposal may be viewed as micromanaging the company.”

The Staff has previously concurred in exclusion of proposals as micromanaging the company where the proposal seeks to require stockholder approval of activities typically within the purview of the board and management. In Walgreens Boots Alliance, Inc. (Young) (avail. Nov. 20, 2018), the proposal requested that any open market share repurchase program or stock buyback be approved by stockholders prior to becoming effective. The company asserted that although the proposal did not specify any terms or conditions of any particular repurchase program, it would subject the terms of each and every stock repurchase program to stockholder approval and would effectively give complete “control over the implementation, or lack thereof, of any stock repurchase program that management and the Board [would] have approved” and “would permit stockholders to dictate the terms of any stock repurchases undertaken by the [c]ompany.” In concurring in exclusion, the Staff stated that “the [p]roposal micromanages the [c]ompany” and noted in particular that “the [p]roposal would make each new share repurchase program and each and every stock buyback dependent on shareholder approval.” See also Royal Caribbean Cruises Ltd. (avail. Mar. 14, 2019) (concurring in exclusion of a proposal substantially similar to the proposal in Walgreens); Abbot Laboratories (Oxfam America) (avail. Feb. 28, 2019) (concurring in exclusion of a proposal requesting compensation committee approval of sales of compensation shares by senior executives during buybacks as micromanagement and an explanation for the compensation committee’s decision in the proxy statement because “the [p]roposal would require the compensation committee to approve each communities.” In its no-action request, the company successfully argued that “[e]ven if some of [the] issues that would be addressed in the report requested by the [p]roposal could touch upon significant policy issues within the meaning of the Staff’s interpretation, the [p]roposal is not focused on those issues, but instead encompasses a wide range of issues implicating the [c]ompany’s ordinary business operations within the meaning of Rule 14a-8(i)(7), and therefore may properly be excluded under Rule 14a-8(i)(7).” The Staff concurred and granted no-action relief under Rule 14a-8(i)(7) noting that “the [p]roposal relates generally to ‘the community impacts’ of the [c]ompany’s operations and does not appear to focus on an issue that transcends ordinary business matters” (emphasis added).
sale . . . [and] include explanatory disclosure in the proxy statement describing how the committee concluded that approving the sale was in the company’s long-term best interest”.

In addition, the Staff has previously determined that certain proposals relating to oversight of the company’s ordinary business affairs sought to micromanage the company by replacing the judgment of the board. In Amazon.com, Inc. (Oxfam America) (avail. Apr. 3, 2019) (“Amazon.com (Oxfam”), the proposal requested human rights impact assessments for certain food products sold by the company. The company argued that it had already “carefully evaluated the most impactful means for addressing sustainability implications of its businesses, including those related to human rights considerations in its supply chain, and ha[d] already undertaken numerous initiatives to address [the] issue [raised in the proposal] in ways that the company believe[d] [were] best.” In concurring in exclusion, the Staff noted that “the proposal would micromanage the company by seeking to impose specific methods for implementing complex policies in place of the ongoing judgments of management as overseen by its board of directors” (emphasis added).

Here, implementation of the Proposal would require that any and all amendments to the By-laws be subject to stockholder vote. While the Supporting Statement expresses concerns with the impact that By-law amendments “can have on reducing the accountability of directors and managers and/or on limiting the rights of shareholders,” the text of the Proposal does not limit the stockholder vote requirement to any specific By-law provisions; in fact, the Proposal does not contain any limitations as to which By-law amendments would require stockholder vote. The Proposal micromanages the Company because the Board would be unable to carry out its fiduciary duties with respect to any amendments to the By-laws—regardless of the nature of the amendments, no matter how administrative, minuscule, or mundane such amendments might be—without putting the amendment up for a stockholder vote. As discussed above, the Board is empowered by the Certificate of Incorporation to act unilaterally and may act immediately, as needed, to address any outstanding issues regarding the By-laws. However, the Proposal would interfere with the Board’s ability to carry out its duties with respect to the By-laws, particularly when time is of the essence. Specifically, the Board would be hamstrung by the Proposal when considering any amendment to the By-laws since holding a stockholder vote requires a significant amount of Company time and resources.

Like the proposals in Walgreens and Royal Caribbean, the Proposal would make each and every amendment to the By-laws subject to a stockholder vote. In this regard, the Proposal is even broader than the proposals in Walgreens and Royal Caribbean because, as discussed above, it is not limited to any specific or subset of amendments. Therefore, like in Amazon.com (Oxfam), implementation of the Proposal subjecting each and every amendment to the By-laws

---

8 See also Amazon.com, Inc. (avail. Mar. 20, 2013) (concurring in exclusion on micromanagement grounds where the proposal requested the board hold a competition for giving public advice related to voting items in the company’s 2014 proxy); and General Electric Co. (avail. Jan. 25, 2012, recon. denied Apr. 16, 2012) (concurring in exclusion on micromanagement grounds where the proposal sought procedural changes to the method by which the company would evaluate the performance of its independent directors).
to a stockholder vote would replace the ongoing judgments of the Board with that of the Company’s stockholders.

Accordingly, for the reasons set forth above, the Proposal may properly be excluded under Rule 14a-8(i)(7).

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

The Proposal is open to at least two conflicting interpretations and is therefore excludable under Rule 14a-8(i)(3) as impermissibly vague and indefinite. The plain reading of the Proposal is that the effectiveness of any By-law amendment adopted by the Board must be delayed until a stockholder vote is held. Under this interpretation, the Proposal clearly violates Delaware law—as summarized in Section I above—and, therefore, the Proposal is excludable under Rule 14a-8(i)(2). In an alternative interpretation, all the Proposal requires is a stockholder vote, but the vote itself will have no effect on either the By-law amendment or its effectiveness, comparable to an advisory vote. Given the two conflicting interpretations, the Proposal is impermissibly vague and misleading and, therefore, is excludable in its entirety under Rule 14a-8(i)(3).

A. Background.

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

The Staff consistently has concurred that proposals are excludable under Rule 14a-8(i)(3) when the language of the proposal is vague and certain provisions are open to two or more interpretations. For example, in Cisco Systems, Inc. (avail. Oct. 7, 2016), a proposal asked that “[t]he board shall not take any action whose primary purpose is to prevent the effectiveness of [a] shareholder vote without a compelling justification for such action.” The company argued that there were numerous possible interpretations to “prevent the effectiveness of [a] shareholder vote,” ranging from broad, plain language interpretations to succinct, statutory interpretations in

---

9 As explained in the Delaware Law Opinion, even this second interpretation would violate Delaware law if implemented.
accordance with state law. The Staff concurred in exclusion under Rule 14a-8(i)(3) noting that “in applying this particular proposal to [the company], neither shareholders nor the company would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires.” See also Alaska Air Group, Inc. (avail. Mar. 20, 2016) (concurring in exclusion of a proposal requesting an amendment to the company’s by-laws and any other appropriate governing documents to require management to “strictly honor shareholders rights to disclosure identification and contact information” where the company argued that the proposal and supporting statement “[did] not describe or define in any meaningfully determinate way the standard for [the] supposed ‘shareholder[s] rights’” and that “it appear[ed] the [p]roponent ha[d] a different view of what those rights entail[ed] than is supported by generally understood principles of corporate law”); The Home Depot, Inc. (avail. Mar. 12, 2014, recon. denied Mar. 27, 2014) (concurring in exclusion of a proposal requesting a sustainability report where the company argued that the meaning of “benchmark objective footprint information” was unclear); Morgan Stanley (avail. Mar. 12, 2013) (concurring in exclusion of a proposal where the company argued that the key term “extraordinary transactions” could have multiple interpretations); Exxon Mobil Corp. (Naylor) (avail. Mar. 21, 2011) (concurring in exclusion of a proposal requesting a report “using guidelines from the Global Reporting Initiative” where the proposal did “not sufficiently explain the “guidelines from the Global Reporting initiative””); Amazon.com, Inc. (Recon.) (avail. Apr. 7, 2010) (concurring in exclusion of a proposal relating to shareholder special meetings rights where the supporting statement explained “that shareholders will have no less rights at management-called special meetings than management has at shareholder-called special meetings to the fullest extent permitted by law” and the Staff stating “it [was] unclear what ‘rights’ the proposal intend[ed] to regulate”).

B. Key Portions Of The Proposal Are Open To At Least Two Conflicting Interpretations.

Here, the Proposal is vague and indefinite so as to be inherently misleading because it is vaguely worded such that the Company would not know what impact, if any, the Proposal’s requirements would have on the effectiveness of any By-law amendment adopted by the Board given that the stockholder vote is non-binding. Specifically, as summarized above, the Proposal states that “any amendment to bylaws that is approved by the board shall be subject to a non-binding shareholder vote as soon as practical unless such amendment is already subject to a binding shareholder vote.” Importantly, the Proposal is open to two different and conflicting interpretations as follows:

**Interpretation One:**

- One reading of the Proposal suggests that no By-law amendment adopted by the Board can be effective until a non-binding stockholder vote is held (regardless of the ultimate outcome). In other words, the vote must be held, even though it is non-binding, in order for such By-law amendment adopted by the Board to become effective.

**Interpretation Two:**

- A different reading of the Proposal is that the Board has full authority to amend the By-laws and to determine when any particular By-law amendment becomes effective.
In other words, all that is required by the Proposal is that a non-binding stockholder vote on any such amendment be held “as soon as practical,” but such vote would have no actual impact on the validity or effectiveness of the By-law amendment (similar to the “say-on-pay” votes that U.S. public companies are required to hold seeking approval of their executive compensation).

Note that Interpretation Two is also inherently ambiguous on its own since there is further uncertainty as to the effect of a failure to hold a non-binding stockholder vote on a Board-approved By-law amendment. The Proposal provides no guidance as to whether the failure to hold a vote would render such By-law amendment invalid or unenforceable and, if so, at what point in time. That is, following some unspecified point in time that is later than “as soon as practical,” would the By-law amendment be invalid in its entirety or be unenforceable until such time that a non-binding vote of stockholders is held?

The ambiguity caused by the vague wording in the Proposal results in the Company not knowing with any certainty exactly what actions are required to make a By-law amendment effective. Moreover, the Supporting Statement provides no additional guidance as to how to resolve this ambiguity. Because the Proposal reasonably can be read to have two differing and conflicting interpretations, stockholders voting on the Proposal are unlikely to all agree as to how this ambiguity should be resolved, such that it would be impossible to assure that all stockholders voting on the Proposal share a common understanding of the effect of implementing the Proposal. As a result, the Company would not be able to determine with any reasonable certainty whether stockholders intended to approve a By-law amendment that (i) prevents the Board from effecting any Board-approved By-law amendments until a non-binding vote of stockholders has been held or (ii) simply provides an opportunity for stockholders to voice potential concerns with any By-law amendment adopted by the Board via a non-binding vote that otherwise has no legal effect on the validity or effectiveness of any such By-law amendment.

Accordingly, like in Cisco Systems, Alaska Air Group, and the other precedent cited above, the Proposal’s inherent ambiguities subject the Proposal to two conflicting interpretations by the Company’s stockholders such that they are unable “to determine with any reasonable certainty exactly what actions or measures the proposal requires” (SLB 14B) and could not be expected to make an informed decision on the merits of the Proposal. Accordingly, as a result of the vague and indefinite nature of the Proposal, we believe the Proposal is impermissibly misleading and, therefore, excludable in its entirety under Rule 14a-8(i)(3).

CONCLUSION

Based upon the foregoing analysis, we respectfully request on behalf of the Company that the Staff concur that it will take no action if the Company excludes the Shareholder Proposal from its 2020 Proxy Materials in reliance on Rule 14a-8(i)(2), Rule 14a-8(i)(7) and Rule 14a-8(i)(3)s of the Exchange Act.

If the Staff has any questions with respect to the foregoing, please do not hesitate to contact us at (212) 225-2376 or by email at hgrannis@cgsh.com or Su Ping Lu, the Company’s Deputy Corporate Secretary at (704) 627-6200 or by email at suping.lu@honeywell.com.
Very truly yours,

Helena K. Grannis, Esq.
Cleary Gottlieb Steen & Hamilton LLP

cc: Su Ping Lu, Deputy Corporate Secretary, Honeywell International Inc.
John Chevedden
EXHIBIT A

See Attached.
Ms. Anne T. Madden  
Corporate Secretary  
Honeywell International (HON)  
115 Tabor Road  
Morris Plains, New Jersey 07950  
PH: 973-455-2000  
FX: 973-455-4002  
FX: 973-455-4413

Dear Ms. Madden,

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. This proposal is intended to be implement as soon as possible.

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 to

Sincerely,

cc: Su Ping Lu  <Suping.Lu@Honeywell.com>  
Adria Kesselman  <adria.kesselman@honeywell.com>

Shareholders request that the Board of Directors amend the bylaws to require that any amendment to bylaws that is approved by the board shall be subject to a non-binding shareholder vote as soon as practical unless such amendment is already subject to a binding shareholder vote.

It is important that bylaw amendments take into consideration the impact that such amendments can have on reducing the accountability of directors and managers and/or on limiting the rights of shareholders. For example, Directors could adopt a narrowly crafted exclusive forum bylaw to suit the unique circumstances of the company.

A proxy advisor recently adopted a policy to vote against directors who unilaterally adopt bylaw provisions or amendments to the articles of incorporation that materially diminish shareholder rights.

Our directors could be neutral on this proposal to obtain feedback from shareholders without interference. However if our directors oppose this proposal then it would be useful for our directors to give recent examples of companies whose directors took the initiative and adopted bylaws that primarily benefitted shareholders.

Please vote yes:
Let Shareholders Vote on Bylaw Amendments – Proposal [4]
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(I)(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 ***
Ms. Anne T. Madden  
Corporate Secretary  
Honeywell International (HON)  
115 Tabor Road  
Morris Plains, New Jersey 07950  
PH: 973-455-2000  
FX: 973-455-4002  
FX: 973-455-4413

Dear Ms. Madden,

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. This proposal is intended to be implement as soon as possible.

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 to

Sincerely,  

cc: Su Ping Lu <Suping.Lu@Honeywell.com>  
    Adria Kesselman <adria.kesselman@honeywell.com>

Date

Shareholders request that the Board of Directors adopt a bylaw that no amendment to the bylaws, that is adopted by the board, shall take effect until it has been approved by a vote of the shareholders. If for some reason state law would restrict this shareholder approval provision then this proposal would call for a non-binding shareholder vote as soon as practical on any amendment to the bylaws that is adopted by the board.

It is important that bylaw amendments take into consideration the impact that such amendments might have on limiting the rights of shareholders or reducing the responsibilities of directors and managers.

If our directors are opposed to this then it would be useful for our directors to give recent examples of companies whose directors took the initiative and adopted bylaws that benefitted shareholders.

Please vote yes:
Shareholder Approval of Bylaw Amendments – 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(I)(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

See Attached.
December 23, 2019

Honeywell International Inc.
300 South Tryon Street
Charlotte, NC 28202

RE: Stockholder Proposal Submitted by John Chevedden

Ladies and Gentlemen:

This letter confirms our opinion regarding a stockholder proposal (the “Proposal”) submitted to Honeywell International Inc., a Delaware corporation (the “Company”), by John Chevedden (the “Proponent”) for inclusion in the Company’s proxy materials for its 2020 annual meeting of stockholders.

I. Summary.

The Proposal asks the Board of Directors of the Company (the “Board”) to amend the By-laws of the Company to require that

any amendment to [the] bylaws that is approved by the board shall be subject to a non-binding shareholder vote as soon as practical unless such amendment is already subject to a binding shareholder vote.

The by-law urged by the Proposal would contradict the Company’s Amended and Restated Certificate of Incorporation (the “Certificate”). Specifically, the Proposal would condition the Board’s power to adopt future By-law amendments on a requirement that the amendments be submitted for a non-binding stockholder vote, but the Certificate grants the Board the unqualified power to amend the By-laws. The Delaware General Corporation Law (the “DGCL”) prohibits the By-laws from containing any provision that is inconsistent with the Certificate. For this reason, the Company would violate Delaware law if the Board implemented the Proposal, and the Proposal is not a proper subject for stockholder action.

As an alternative basis for our opinion, the Proposal would also violate Delaware law because it would force the Board to seek a non-binding stockholder vote on future By-law amendments adopted by the Board. A by-law cannot force the Board, in the future, to expend
II. Analysis.

A. The By-law urged by the Proposal would contradict the Certificate and therefore violate Section 109 of the DGCL.

The Proposal asks the Board to adopt a new by-law that would require future By-law amendments adopted by the Board to be "subject to" a non-binding stockholder vote. The Proposal is ambiguous on when the vote must be held. Read one way, each By-law amendment adopted by the Board in the future would not be effective until after the amendment is submitted for a non-binding stockholder vote. Read another way, the Board could amend the By-laws effective immediately, but the Board would need to be willing to later submit its amendment for a non-binding stockholder vote.

Under either reading, the Proposal would have the Board, acting today, adopt a By-law that imposes a non-binding stockholder vote as a condition for the Board to amend the By-laws in the future. The by-law urged by the Proposal would therefore contradict the Certificate, which grants the Board the unqualified power to amend the By-laws without any conditions. Article EIGHTH of the Certificate provides that "The Board of Directors may from time to time make, amend, supplement or repeal the By-laws; provided, however, that the stockholders may change or repeal any By-law adopted by the Board of Directors." The Certificate does not provide that a Board-adopted By-law amendment can be conditioned on a prior non-binding stockholder vote, nor does the Certificate permit a By-law amendment to be somehow repealed if there is no after-the-fact non-binding stockholder vote.\(^1\)

Given this conflict, the Proposal would violate the DGCL. Under Section 109(b) of the DGCL, the By-laws may only contain provisions that are consistent with the Certificate:

The by-laws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.

---

\(^1\) Under the Certificate, the stockholders can later adopt their own binding amendment to repeal a Board-adopted by-law, but that later stockholder action would be unrelated to the Board's amendment. In other words, the Board's By-law amendment would have immediate effect, with no other requirements imposed on the Board. The stockholders must take a later, separate action to repeal the Board's amendment.
Applying Section 109(b), the Delaware courts have consistently held that by-laws contradicting the certificate of incorporation are invalid and a "nullity." These cases span several decades.2

The Delaware Supreme Court has in fact invalidated a by-law that purported to restrict the unqualified power of the directors to adopt future by-law amendments. Specifically, in Centaur Partners, a proponent asked stockholders to adopt a by-law fixing the size of the board and purporting to specify that the by-law would not be subject to future amendment by the board. The certificate of incorporation of the corporation at issue in Centaur Partners provided that the size of the board was to be fixed in the by-laws, and the certificate provided the board the "general authority to adopt or amend the corporate by-laws."3 The Delaware Supreme Court held that the proposal "would be a nullity if adopted" because it was clearly inconsistent with the board’s power to amend the by-laws (and thereby make further changes to board size). The Proposal contains the same type of conflict because it would limit the Board’s power to amend the By-laws, in contradiction to a Certificate provision granting the Board the unqualified power to amend the By-laws.

Because the Proposal would cause the Company to violate Section 109(b) of the DGCL and the Delaware cases applying that statute, the Proposal would violate Delaware law if the Board implemented it. Furthermore, because Section 109(b) of the DGCL prohibits the By-laws from containing provisions inconsistent with the Certificate, the Proposal is not a proper subject for stockholder action under Delaware law.4

B. The Proposal would force the Company to include non-binding stockholder votes on the Company’s proxy materials, in violation of Delaware law.

If the Board implemented the Proposal, then each time in the future that the Board amends the By-laws, regardless of the subject of the By-law amendment, the Company would be forced to include, in its proxy materials for a stockholder meeting, a non-binding stockholder vote on the Board’s amendment. Delaware law does not allow for this scheme, where a non-binding proposal must automatically be placed on the Company’s proxy materials for a future meeting.


3 Although not quoted in the opinion, the certificate provision in Centaur that conferred by-law amendment power on the board is very similar to the Company’s Certificate. See Restated Certificate of Incorporation of National Intergroup, Inc., Article SEVENTH (“In furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized to make, alter or repeal the by-laws of the Corporation.”) (publicly filed with the Secretary of State of the State of Delaware on March 18, 1983).

4 See CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227 (Del. 2008) (analyzing whether a proposed by-law was a proper subject for stockholder action by inquiring (among other considerations) whether the proposal is within the "scope of shareholder action that Section 109(b) permits").
Under Delaware law, a corporation cannot be required to include on its proxy materials proposals that are selected in the indiscriminate manner urged by the Proponent. A by-law cannot force the directors to cause the Company to incur the expenses associated with soliciting a vote on these proposals if the directors determine that vote is not advisable. In CA, Inc. v. AFSCME Employees Pension Plan, the Delaware Supreme Court reached this conclusion, in an opinion that answered questions certified to it by the Securities and Exchange Commission. In AFSCME, the Delaware Supreme Court held that a by-law would violate Delaware law if it required a corporation to reimburse a stockholder’s expenses for soliciting proxies in favor of the stockholder’s candidates for director election. The Court held the by-law would be invalid because the by-law “contain[ed] no language or provision that would reserve to [the corporation’s] directors their full power to exercise their fiduciary duty to decide whether or not it would be appropriate, in a specific case, to award reimbursement at all.” The Court held that the directors must be able to deny expense reimbursement. If a stockholder’s proxy contest “is motivated by personal or petty concerns, or to promote interests that do not further, or are adverse to, those of the corporation, the board’s fiduciary duties could compel that reimbursement be denied altogether.”

Like the by-law at issue in AFSCME, the by-law urged by the Proposal would afford future directors no discretion to determine whether the corporation should invest the time and expense to present a future By-law amendment for a non-binding stockholder vote. Certain by-law amendments could be purely ministerial in nature (like changing the method of sending notice of board meetings from mail to email), could relate to a management issue (like determining which officers are authorized to sign contracts) or could address mundane housekeeping issues (like identifying which officers will sign stock certificates). The Proposal would require the Company to incur the expense and distraction of including in its proxy materials a stockholder proposal seeking a non-binding straw vote on each and every one of these By-law amendments, no matter how inconsequential, and even if none of the stockholders supports having a vote on these topics. Accordingly, it is possible (quite likely) that Company funds would be spent seeking a non-binding vote that does not “promote the interests” of the Company, including because no director or stockholder desires a vote on that matter.

In our view, the legislative history on recent amendments to the DGCL confirms that the non-binding votes urged by the Proposal would violate Delaware law. After the AFSCME decision, the Delaware General Assembly amended the DGCL to provide that the by-laws may require a corporation to reimburse a stockholder for expenses he or she incurs in soliciting proxies to elect a candidate for director election. In the same year, the DGCL was also amended to allow by-laws that require a corporation to give “proxy access” (i.e., include in its

5 A bylaw might be able to require inclusion of proposals on a targeted subject. See Securities and Exchange Commission v. Transamerica Corp., 163 F.2d 511 (3rd Cir. 1947) (permitting a bylaw that requires the stockholders to select an independent auditor). But as noted below, the Proposal makes no attempt to determine which By-law amendments are subject to future stockholder approval.

6 Id. at 240.

7 Id.
proxy materials) to stockholder candidates for director election. Importantly, both of those DGCL amendments authorize the use of corporate funds in connection with candidates for director election, not for other stockholder proposals. In other words, the DGCL amendments overturned AFSCME only to authorize the use of company funds and access to company proxy materials for director elections. These DGCL amendments evidence a decision by the drafters of the amendments that director elections involve corporate policies that justify the expenditure of corporate funds if the by-laws so provide. The DGCL amendments do not affect how AFSCME would apply to stockholder votes on other matters, like a non-binding vote on each and every by-law that the Board might adopt in the future. On these types of proposals, the Board continues to have the discretion to determine what matters will be included on the Company’s proxy materials.

For the foregoing reasons, we believe that the Proposal would violate Delaware law if the Board implemented it.

***

8 DGCL, § 112 (“The bylaws may provide that if the corporation solicits proxies with respect to an election of directors, it may be required, to the extent and subject to such procedures or conditions as may be provided in the bylaws, to include in its proxy solicitation materials . . . 1 or more individuals nominated by a stockholder.”); DGCL, § 113 (“The bylaws may provide for the reimbursement by the corporation of expenses incurred by a stockholder in soliciting proxies in connection with an election of directors, subject to such procedures or conditions as the bylaws may prescribe . . .”).

9 We are aware that Rule 14a-8 promulgated under the Securities Exchange Act of 1934 requires a stockholder proposal to be placed on a corporation’s proxy materials, even if the board of directors objects to that inclusion. Rule 14a-8 evidences a mandate of federal law that preempts Delaware law. However, we also note that the future non-binding stockholder votes that the Proponent seeks would not comply with Rule 14a-8. Rule 14a-8 requires a stockholder who satisfies certain ownership and eligibility requirements to present a specific proposal for inclusion in the proxy materials. As noted above, the Proposal would have the Company indiscriminately submit all Board-adopted By-law amendments to a stockholder vote, even if no stockholder proponent (satisfying Rule 14a-8 or otherwise) supports seeking a stockholder vote on the Board’s By-law amendment.
III. Conclusion.

For the reasons set forth in Part II.A above, the Proposal would, if implemented, cause the Company to violate Delaware law and is not a proper subject for stockholder action. In addition, the Proposal would, if implemented, cause the Company to violate Delaware law for the alternative reasons set forth in Part II.B above.

Very truly yours,

[Signature]

Morriss, Nichols, Arsht & Tunnell LLP

13365524