

**JOHN CHEVEDDEN**

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January 27, 2020

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

**# 10 Rule 14a-8 Proposal**

**Hewlett Packard Enterprise Company (HPE)**

**[Non-binding] Shareholder Approval of Bylaw Amendments [after the fact]**

**John Chevedden**

Ladies and Gentlemen:

This is in regard to the November 22, 2019 no-action request.

Management recently submitted an aggressive management opposition statement to the proponent party to correspond with this proposal. The management opposition statement seems to indicate that management already has a remedy for its grievance with this proposal and thus the no action request is unnecessary.

Management is saying in effect that if it loses its no action request it can still repeat its overboard arguments that would by then have failed to gain any traction in the no action process.

The cover letter with the management opposition statement did not say that the management opposition statement may be revised following the Staff determination.

Sincerely,

  
John Chevedden

cc: Derek Windham <derek.windham@hpe.com>

JOHN CHEVEDDEN

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January 21, 2020

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

**# 9 Rule 14a-8 Proposal**

**Hewlett Packard Enterprise Company (HPE)**

**[Non-binding] Shareholder Approval of Bylaw Amendments [after the fact]**

**John Chevedden**

Ladies and Gentlemen:

This is in regard to the November 22, 2019 no-action request.

A proxy advisor adopted a policy to vote against directors who unilaterally adopted bylaw provisions or amendments to the articles of incorporation that materially diminish shareholder rights in 2016.

In 2019 the unilateral Board actions that triggered proxy advisor negative recommendation in regard to directors included new limits on shareholder rights to amend bylaws, adopting a fee-shifting bylaw, amending a company charter to effect a reverse stock split, adopting a classified board and increasing the stock ownership percent threshold to call a special meeting.

None of these are ordinary business.

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

Sincerely,

  
John Chevedden

cc: Derek Windham <derek.windham@hpe.com>

**JOHN CHEVEDDEN**

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January 20, 2020

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

**# 8 Rule 14a-8 Proposal**

**Hewlett Packard Enterprise Company (HPE)**

**[Non-binding] Shareholder Approval of Bylaw Amendments [after the fact]**

**John Chevedden**

Ladies and Gentlemen:

This is in regard to the November 22, 2019 no-action request.

It is important to note that management's description of purported precedents flip back and forth from quoting past Staff Reply Letters to claiming that companies "successfully argued" quotes take directly from company no action requests that were not repeated in the Staff Reply Letter.

This is a fudge factor in a vast number of no action requests and can give the erroneous impression that in every instance the Staff endorsed exact quotes lifted from a number of past no action requests.

Also the company does not give any reason for it to supposedly know whether its carefully selected quotes from past no action requests were an in-spite-of factor or a deciding factor.

Sincerely,



*John Chevedden*

John Chevedden

cc: Derek Windham <derek.windham@hpe.com>

**JOHN CHEVEDDEN**

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January 14, 2020

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

**# 7 Rule 14a-8 Proposal**

**Hewlett Packard Enterprise Company (HPE)**

**[Non-binding] Shareholder Approval of Bylaw Amendments [after the fact]**

**John Chevedden**

Ladies and Gentlemen:

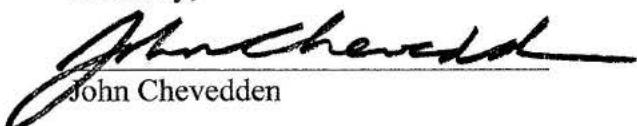
This is in regard to the November 22, 2019 no-action request.

It is important to note that management's description of purported precedents flip back and forth from quoting past Staff Reply Letters to claiming that companies "successfully argued" quotes take directly from company no action requests that were not repeated in the Staff Reply Letter.

This is a fudge factor in a vast number of no action requests and can give the erroneous impression that in every instance the Staff endorsed exact quotes lifted from a number of past no action requests.

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

Sincerely,



John Chevedden

cc: Derek Windham <derek.windham@hpe.com>

**JOHN CHEVEDDEN**

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January 6, 2020

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

**# 6 Rule 14a-8 Proposal**

**Hewlett Packard Enterprise Company (HPE)**  
**[Non-binding] Shareholder Approval of Bylaw Amendments [after the fact]**  
**John Chevedden**

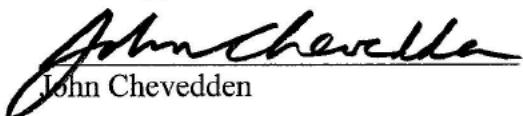
Ladies and Gentlemen:

This is in regard to the November 22, 2019 no-action request.

The outside opinion does not explain how the so-called “unfettered authority” of the Board coexists with the mandatory shareholder say on pay vote.

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

Sincerely,



John Chevedden

cc: Derek Windham <derek.windham@hpe.com>

**JOHN CHEVEDDEN**

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January 2, 2020

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

**# 5 Rule 14a-8 Proposal**

**Hewlett Packard Enterprise Company (HPE)**  
**[Non-binding] Shareholder Approval of Bylaw Amendments [after the fact]**  
**John Chevedden**

Ladies and Gentlemen:

This is in regard to the November 22, 2019 no-action request.

Management does not claim that it lacks the power to change the bylaws in a number of ways that go beyond ordinary business.

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

Sincerely,



John Chevedden

cc: Derek Windham <derek.windham@hpe.com>

**JOHN CHEVEDDEN**

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December 15, 2019

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

**# 4 Rule 14a-8 Proposal**

**Hewlett Packard Enterprise Company (HPE)**

**[Non-binding] Shareholder Approval of Bylaw Amendments [after the fact]**

**John Chevedden**

Ladies and Gentlemen:

This is in regard to the November 22, 2019 no-action request.

This is an as-if no action request. This 16-page no action request is hard to follow because it booms back and forth from considering part of the resolved statement *as if it was the entire resolved statement* to considering the full resolved statement.

The no action request had the major non sequitur of:

“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.”

“See also *Royal Caribbean Cruises Ltd.* (avail. Mar. 14, 2019) (concurring in exclusion of a proposal substantially similar to the proposal in *Walgreens*)”

“Like the proposals in *Walgreens* and *Royal Caribbean*, the Proposal would make each and every amendment to the Bylaws subject to a stockholder vote.”

The company fails to distinguish its outside opinion from the failed outside opinion in *FedEx Corporation* (July 3, 2018).

The company fails to even claim that the supporting statement of this proposal suggests that the resolved statement is focused on issues like community impact, the Animal Welfare Act or environmental impact. Yet the company provides so-called precedents on issues like these.

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

Sincerely,



John Chevedden

cc: Derek Windham <derek.windham@hpe.com>

JOHN CHEVEDDEN

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December 8, 2019

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

**# 3 Rule 14a-8 Proposal**

**Hewlett Packard Enterprise Company (HPE)**

**[Non-binding] Shareholder Approval of Bylaw Amendments [after the fact]**

**John Chevedden**

Ladies and Gentlemen:

This is in regard to the November 22, 2019 no-action request.

This 16-page no action request can be hard to follow because it boobs back and forth from considering part of the resolved statement to considering the full resolved statement.

The full resolved statement includes, “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.”

The rule 14a-8 proposal in *FedEx Corporation* (July 3, 2018) was a more encompassing proposal with the resolved statement of:

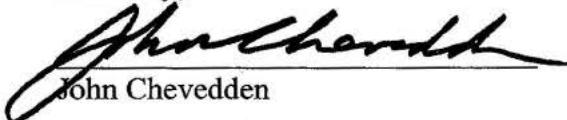
“Shareholders request that the Board of Directors take the steps necessary to include text in the company bylaws that states that each bylaw amendment that is adopted by the Board of Directors shall not become effective until approved by shareholders.”

The outside opinion does not address whether the 2019 HPE shareholder say on pay vote took away the “unlimited authority” of the Board.

There will be additional responses.

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

Sincerely,



John Chevedden

cc: Derek Windham <derek.windham@hpe.com>

**Proposal [4] – Shareholder Approval of Bylaw Changes**

Shareholders request that the Board of Directors take the steps necessary to include text in the company bylaws that states that each bylaw amendment that is adopted by the Board of Directors shall not become effective until approved by shareholders.

Adoption of this proposal is timely since many companies highlight their shareholder engagement efforts in their annual meeting proxies. This included FedEx. A shareholder vote is one way to engage with shareholders that can be measured objectively.

It is important to address this low hanging fruit to improve the corporate governance of FedEx especially when there is higher hanging fruit that needs addressing. For instance 5 FedEx directors each had 15 to 47 years long-tenure. Long-tenure can impair the independence of a director no matter how well qualified. And independence is an all-important qualification for a Director. And these long-tenured directors controlled 40% of the FedEx Audit Committee and Executive Pay Committee.

Directors Susan Schwab and Shirley Jackson were also potentially overextended with 4 directorships at 4 companies each. Plus these 2 directors had extra director duties at FedEx. Marvin Ellison, with 4-years to accumulate FedEx shares as a director, was reported as owning no stock. And Mr. Ellison was assigned to 2 of the most most important FedEx board committees.

Please vote to enhance management engagement with shareholders:

**Shareholder Approval of Bylaw Changes**

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

**JOHN CHEVEDDEN**

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December 1, 2019

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

**# 2 Rule 14a-8 Proposal**

**Hewlett Packard Enterprise Company (HPE)**  
**[Non-binding] Shareholder Approval of Bylaw Amendments [after the fact]**  
**John Chevedden**

Ladies and Gentlemen:

This is in regard to the November 22, 2019 no-action request.

The attached extracts illustrate the non sequitur nature of the no action request.

There will be additional responses.

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

Sincerely,



John Chevedden

cc: Derek Windham <derek.windham@hpe.com>

# GIBSON DUNN

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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.

# GIBSON DUNN

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*See also Royal Caribbean Cruises Ltd.* (avail. Mar. 14, 2019) (concurring in exclusion of a proposal substantially similar to the proposal in *Walgreens*);

# GIBSON DUNN

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Division of Corporation Finance  
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Page 9

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Like the proposals in *Walgreens* and *Royal Caribbean*, the Proposal would make each and every amendment to the Bylaws subject to a stockholder vote.

**JOHN CHEVEDDEN**

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November 22, 2019

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

**# 1 Rule 14a-8 Proposal**  
**Hewlett Packard Enterprise Company (HPE)**  
**[Non-binding] Shareholder Approval of Bylaw Amendments**  
**John Chevedden**

Ladies and Gentlemen:

This is in regard to the November 22, 2019 no-action request.

This no action requests seems to be at war with the recent management practice of Delaware companies instigating shareholder votes on existing bylaws provisions regarding special shareholder meetings.

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

Sincerely,



John Chevedden

cc: Derek Windham <derek.windham@hpe.com>

**Proposal [4] – 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 give 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.

Hundreds of major companies enable shareholder action by written consent. 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 also won 63%-support at Cigna Corp. (CI) in 2019. This proposal topic would have received higher votes than 63% to 67% at these companies if more shareholders had access to independent proxy voting advice.

This proposal topic also won 51%-support at our 2018 annual meeting. Written consent is gaining acceptance as a more valuable right for shareholders than the right to call for a special meeting.

Taking action by written consent in place of a meeting is a means shareholders can use to raise important matters outside the normal annual meeting cycle like the election of a new director. This is particularly important since our stock has fallen from \$25 in October 2019. Poor stock performance also follows a June 2018 announcement of additional share repurchase authorization of up to \$4 Billion which was supposed to increase the price of HP stock even if HP does not perform better.

Dion Weisler is no longer our CEO after his \$27 million in total realized pay in 2018. And there is the October 2019 headline that HP stock tumbled after HP announced plans to cut up to 9,000 jobs.

Hopefully Mr. Enrique Lores will break with the recent practice of a remote communication annual meeting. A live annual meeting will allow shareholders to be impressed with the plans that Mr. Lores has for HP. A live annual meeting will almost guarantee that there will be a news article on the annual meeting (as opposed to a remote communication meeting) for the benefit of the vast majority of shareholders. A photograph of Mr. Lores that accompanied an article on his new HP job appears to show him enjoying a presentation to a live audience.

Please vote yes:

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

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

November 22, 2019

Lori Zyskowski  
Direct: +1 212.351.2309  
Fax: +1 212.351.6309  
[LZyskowski@gibsondunn.com](mailto:LZyskowski@gibsondunn.com)

**VIA E-MAIL**

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

Re: *Hewlett Packard Enterprise Company*  
*Stockholder Proposal of John Chevedden*  
*Securities Exchange Act of 1934—Rule 14a-8*

Ladies and Gentlemen:

This letter is to inform you that our client, Hewlett Packard Enterprise Company (the “Company”), intends to omit from its proxy statement and form of proxy for its 2020 Annual Meeting of Stockholders (collectively, the “2020 Proxy Materials”) a stockholder proposal (the “Proposal”) and statements in support thereof (the “Supporting Statement”) received from John Chevedden (the “Proponent”).

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

- filed this letter with the Securities and Exchange Commission (the “Commission”) no later than eighty (80) calendar days before the Company intends to file its definitive 2020 Proxy Materials with the Commission; and
- concurrently sent copies of this correspondence to the Proponent.

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

# GIBSON DUNN

Office of Chief Counsel  
Division of Corporation Finance  
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Page 2

## THE PROPOSAL

The Proposal states:

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.

A copy of the Proposal, as well as related correspondence with the Proponent, 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)(7) because the Proposal relates to the ordinary business operations of the Company's Board of Directors and seeks to micromanage the Company;
- Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate Delaware law; and
- Rule 14a-8(i)(3) because the Proposal is impermissibly vague and indefinite so as to be inherently misleading.

## ANALYSIS

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

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)(7) because the Proposal relates to the Company's ordinary business operations and 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.

Office of Chief Counsel  
Division of Corporation Finance  
November 22, 2019  
Page 3

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 bylaws 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

Office of Chief Counsel  
Division of Corporation Finance  
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Page 4

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 Company’s Board of Directors (the “Board”) “adopt a bylaw that no amendment to the [Company’s Bylaws (the “Bylaws”)] . . . shall take effect until it has been approved by a vote of the shareholders.” In other words, the Proposal’s overbroad nature would require that any amendment—substantive or non-substantive—to the Bylaws be subject to stockholder approval before it could be effective. Although the Proposal allows for *non-binding* stockholder votes “as soon as practical” where state law would restrict the stockholder approval provision, that still means that each and every Bylaw amendment would be subject to a stockholder vote, albeit, in this case, non-binding. Most importantly, review of the Bylaws falls squarely within the purview of the Board. Specifically, Section (A) of Article VI of the Company’s Amended and Restated Certificate of Incorporation (the “Certificate of Incorporation”)<sup>1</sup> provides that “management of the business and the conduct of the affairs of the [Company] shall be vested in its Board of Directors.” Section (B) goes on to provide that “the Board of Directors is expressly authorized to make, alter, amend or repeal the Bylaws of the [Company].” Moreover, the Board has tasked the Nominating, Governance and Social Responsibility Committee with the responsibility for reviewing and recommending any amendments to the Bylaws.<sup>2</sup> Therefore, the Board has already determined the best procedures in its Certificate of Incorporation for

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<sup>1</sup> Amended and Restated Certificate of Incorporation of Hewlett Packard Enterprise Company, available at <https://investors.hpe.com/governance/articles-and-bylaws>.

<sup>2</sup> “The Committee reviews proposed changes to [the Company]’s Certificate of Incorporation and Bylaws, and makes recommendations for any changes to the Board.” See Charter of the Nominating, Governance and Social Responsibility Committee of the Board of Directors of the Company, available at: <https://investors.hpe.com/~/media/Files/H/HP-Enterprise-IR/documents/committees/ngsr-charter-2019-july-2019.pdf>.

Office of Chief Counsel  
Division of Corporation Finance  
November 22, 2019  
Page 5

how best to administer its oversight of the Company, and implementing the Proposal would supplant the Board’s judgment and discretion on ordinary business matters related to the procedures it uses to administer its oversight of the Company, because these types of decisions would now be subject to stockholder vote and/or approval.

Furthermore, while the Proposal relates to *any* Board-approved Bylaw 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. Specifically, in theory, the broad scope of the Proposal could, for an indefinite period of time, prevent the Board from acting on the Bylaws, 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 (binding or non-binding) on every Bylaw amendment, including purely administrative changes, such as non-substantive clean-up changes or technical changes to update the Bylaws for Delaware law developments, would necessarily consume the Board’s and 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 recommending amendments to the Bylaws due to the added administrative hurdles associated with obtaining a stockholder vote and/or approval. Accordingly, the Proposal may properly be excluded under Rule 14a-8(i)(7).

C. *The Proposal Does Not Focus On A Significant Policy Issue That Transcends The Company’s Ordinary Business Operations*

Even if the Proposal also touches upon a significant policy issue by virtue of arguably implicating the types of issues that could infringe on stockholder rights, because the Proposal applies broadly to purely administrative, technical, and immaterial Bylaw 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 suffrage issues (which are typically not excludable as ordinary business), the overbroad nature of the Proposal encapsulates any and all amendments to the Bylaws, without regard to the nature of the amendment, no matter how administrative, minuscule, or mundane, including, but not limited to: updates as to who may endorse checks made out to the Company, changes to the Company’s fiscal year, adjustments to the methods by which notice of stockholder meetings may be transmitted (*e.g.*, telegraph, facsimile, electronic mail, or other means of communications based on future advances in technology), revisions to provide for or require new officers of the Company (such as assistant secretary or assistant treasurer), or any number of other technical or immaterial

Office of Chief Counsel  
Division of Corporation Finance  
November 22, 2019  
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amendments to comply with developments in local, state, or federal law or regulations.<sup>3</sup> As such, the Proposal’s broad scope, coupled with the fact that there are no parameters or limitations in the Proposal or the Supporting Statement as to which Bylaw amendments would be subject to stockholder vote and/or approval, 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.

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 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). *See also Mattel, Inc.* (avail. Feb. 10, 2012) (concurring in exclusion of a proposal that requested that the company require its suppliers to publish a report detailing their compliance with the International Council of Toy Industries Code of Business Practices, noting that the ICTJ encompasses “several topics that relate to . . . ordinary business operations and are not significant policy issues”); *PetSmart, Inc.* (avail. Mar. 24, 2011) (concurring in exclusion of a proposal requesting the board to require its suppliers to certify that they had not violated “the Animal Welfare Act, the Lacey Act, or any state law equivalents” noting that “[a]lthough the humane treatment of animals is a significant policy issue, we note your view that the scope of the laws covered by the proposal is ‘fairly broad in nature from serious violations such as animal abuse to violations of administrative matters such as record keeping’”); *JPMorgan Chase & Co.* (avail. Mar. 12, 2010) (concurring in exclusion of a proposal that requested the adoption of a policy banning future financing of companies engaged in a particular practice that impacted the environment because the proposal addressed “matters beyond the environmental impact of [the company’s] project finance decisions”); *Apache Corp.* (avail. Mar. 5, 2008) (concurring in exclusion of a proposal

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<sup>3</sup> 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 bylaws, with no limitation as to the types of bylaw amendments, focus on a significant policy issue.

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requesting the implementation of equal employment opportunity policies based on certain principles and noting that “some of the principles relate to [the company]’s ordinary business operations”).

Here, the Proposal, as drafted, is so overly broad that it would capture any and all Bylaw amendments, no matter the nature of such amendments, be they important issues relating to corporate governance or stockholder suffrage, or administrative or other immaterial issues. As discussed above, given its broad scope, the Proposal would subject each and every Bylaw amendment to stockholder vote and/or approval, interfering with the Board’s ability to act on the Bylaws and properly carry out its oversight functions. Accordingly, because of the Proposal’s overbroad nature, 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).

*D. The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Seeks To Micromanage The Company.*

As explained 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*” (emphases added). 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

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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 sale . . . [and] include explanatory disclosure in the proxy statement describing how the committee concluded that approving the sale was in the [c]ompany’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 [c]ompany believe[d] [were] best.” In concurring in exclusion, the Staff noted that “the [p]roposal would micromanage the [c]ompany 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). *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).

Here, implementation of the Proposal would require that any and all amendments to the Bylaws be subject to stockholder vote and/or approval. While the Supporting Statement expresses concerns with the impact that Bylaw amendments “might have on limiting the rights of shareholders,” the text of the Proposal does not limit the stockholder vote/approval requirements to any specific Bylaw provisions; in fact, the Proposal does not contain any limitations as to which Bylaw amendments would require stockholder vote and/or approval. Therefore, the Proposal micromanages the Company because the Board would be unable to carry out its fiduciary duties with respect to any amendments to the Bylaws—regardless of

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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. This remains the case even if the vote would be non-binding. 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 Bylaws. However, the Proposal would interfere with the Board’s ability to carry out its duties with respect to the Bylaws, particularly when time is of the essence. Specifically, the Board would be hamstrung by the Proposal when considering any amendment to the Bylaws since holding a stockholder vote (regardless of whether it is binding or non-binding) requires a significant amount of Company time and resources. In this regard, the Proposal would “unduly limit the ability of management and the board to manage complex matters with a level of flexibility necessary to fulfill their fiduciary duties to shareholders.” *See SLB 14K.*

Like the proposals in *Walgreens* and *Royal Caribbean*, the Proposal would make each and every amendment to the Bylaws 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 and would, therefore, require that any and all amendments to the Bylaws be subject to a stockholder vote. Moreover, as provided for by the Certificate of Incorporation, the review and recommendation of amendments to the Bylaws falls squarely within the purview of the Board, which already regularly evaluates such amendments through the Nominating, Governance and Social Responsibility Committee. Therefore, like in *Amazon.com (Oxfam)*, implementation of the Proposal subjecting each and every amendment to the Bylaws 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).

## **II. 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 Potter Anderson & Corroon LLP regarding Delaware law (the “Delaware Law Opinion”), the Company believes that the Proposal is excludable under Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate Delaware law. A copy of the Delaware Law Opinion is attached to this letter as Exhibit B.

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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 bylaw 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 bylaw 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 bylaw 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 bylaws); *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 bylaws 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 bylaw 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 bylaw provision that specifies that it may be amended only by shareholders").

Here, the Proposal requests that the Board "adopt a bylaw that no amendment to the [B]lyaws, that is adopted by the [B]oard, shall take effect until it has been approved by a vote of the shareholders" (the "Binding Vote Provision"). It then provides that "[i]f 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 [B]ylaws that is adopted by the [B]oard" (the "Non-Binding Vote Provision"). Under a plain reading of the Proposal, the effectiveness of any amendment to the Bylaws is delayed until a stockholder vote is held, regardless of whether the stockholder vote is held pursuant to the Binding Vote Provision or the Non-Binding Vote Provision. In other words, the only difference between the two provisions is the nature of the stockholder vote (binding versus non-binding). As such, if implemented, the Proposal would violate Delaware law because the proposed Bylaw provision would limit the unfettered authority granted by the Certificate of Incorporation for the Board to unilaterally adopt, amend, or repeal the Bylaws.

Specifically, Section (B) of Article VI of the Certificate of Incorporation states, "[i]n furtherance and not in limitation of the powers conferred by the laws of the State of

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Delaware, the Board of Directors is expressly authorized to make, alter, amend, or repeal the Bylaws of the [Company].” Therefore, as drafted, the Proposal presents a conflict between the proposed Bylaw provision and the Certificate of Incorporation, and, according to the Delaware Law Opinion, “[a]ny bylaw provision that contradicts the certificate of incorporation is invalid and a ‘nullity’ under the [Corporation Law of the State of Delaware].” *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 bylaw that is inconsistent with the corporation’s charter is invalid.”).

As discussed in the Delaware Law Opinion, the Certificate of Incorporation, in accordance with Section 109 of the Corporation Law of the State of Delaware (the “DGCL”), empowers the Board to unilaterally adopt, amend, and repeal the Bylaws and does not impose any limitation on the Board’s power to adopt, amend, or repeal the Bylaws. However, the Proposal, if adopted, “would essentially eliminate[] the Board’s authority to adopt, amend or repeal the Bylaws unilaterally by conditioning the effectiveness of a Board-adopted bylaw on either a binding or non-binding vote of the [Company’s] stockholders[,] which is impermissible under Delaware law.” *See Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 929 (Del. 1990) (holding that a proposed bylaw 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*” under the company’s certificate of incorporation) (emphasis added).

Moreover, as explained in the Delaware Law Opinion, regardless of whether the Proposal’s requirements call for a binding or non-binding stockholder vote, the Proposal “would impermissibly infringe on the Board’s fiduciary duties” by preventing the Board from acting “immediately in response to an actual or perceived threat” where “the Board [has] determined that there [is] a substantial likelihood of harm to the Company in delaying the effectiveness of such [Bylaw] amendment.” By complying with the Proposal’s requirements and delaying a Bylaw amendment’s effectiveness where immediate action is necessary, “the Board would be in breach of its fiduciary duties by not adopting such amendment effective immediately when the Certificate of Incorporation clearly provides the Board the right to do so.” In this regard, compliance with the Proposal where “the Board has the unlimited authority to amend the Bylaws pursuant to the Certificate of Incorporation” would cause the Company’s directors to be put “in a position that could require them to breach their fiduciary duties in order to comply with [the proposed] Bylaw, which is impermissible under Delaware law.” Therefore, pursuant to the Delaware Law Opinion, implementation of the Proposal would violate Delaware law because the proposed Bylaw would require the Company to

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adopt a Bylaw provision that is inconsistent with the Certificate of Incorporation and may also cause the Company’s directors to violate their fiduciary duties.<sup>4</sup>

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 the company’s board of directors “*take the steps necessary* to include text in the company bylaws that states that each bylaw amendment that is adopted by the [b]oard of [d]irectors shall not become effective until approved by shareholders” (emphasis added). While the company’s certificate of incorporation similarly vested in the board unilateral authority to amend the company’s bylaws, the Staff appeared to have agreed with the proponent’s claim that the proposal’s request for the board to “*take the steps necessary*” encompassed, as a first step, amending the company’s certificate of incorporation to remove such unilateral authority. In addition, the company’s certificate of incorporation empowered the board to make, alter, amend and repeal the bylaws “except so far as the [bylaws] adopted by the stockholders shall otherwise provide.” Here, however, the Proposal simply asks the Board to adopt a Bylaw amendment that would require stockholder approval or, at a minimum a stockholder vote, before any (presumably future) Bylaw 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 Bylaws 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 Bylaws similar to those in *FedEx Corp.* Therefore, as confirmed by the Delaware Law Opinion, the Proposal violates 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.

### **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.**

To the extent the Staff does not agree that the Company’s reading of the Proposal in Section II is the correct reading, and does not concur that the Proposal is excludable under Rule 14a-8(i)(2), that would necessarily mean that a key portion of the Proposal is open to at least two conflicting interpretations—as discussed in greater detail below—and is therefore

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<sup>4</sup> In addition, as noted in the Delaware Law Opinion, “approving an action that is not legally permitted due to a conflict with the DGCL or a corporation’s certificate of incorporation” would result in “such action [being] void or voidable under Delaware law.”

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excludable under Rule 14a-8(i)(3) as impermissibly vague and indefinite. More specifically, a plain reading of the Proposal means that the effectiveness of any Bylaw amendment adopted by the Board must be delayed until a stockholder vote is held (regardless of whether such vote is binding or non-binding). Under this interpretation, the Proposal clearly violates Delaware law—as summarized in Section II above—and, therefore, the Proposal is excludable under Rule 14a-8(i)(2). However, if the Staff does not concur in exclusion under Rule 14a-8(i)(2), that automatically leads to a conclusion that the Proposal—and, more specifically, the Non-Binding Vote Provision—can be interpreted in a way that avoids a conflict with Delaware law. Under that interpretation, all the Non-Binding Vote Provision requires is a stockholder vote, but the vote itself will have no effect on either the Bylaw amendment or its effectiveness; in this regard, it would be comparable to an advisory vote. As such, the Proposal is clearly impermissibly misleading and, therefore, is excludable in its entirety under Rule 14a-8(i)(3).

## A. *Background.*

Rule 14a-8(i)(3) permits the exclusion of a stockholder proposal if the proposal or supporting statement is contrary to any of the Commission’s proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. 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”).

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

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

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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 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 bylaws and any other appropriate governing documents to require management to “strictly honor shareholders rights to disclosure identification and contact information” where the company asserted 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”).

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 Bylaw amendment adopted by the Board in circumstances where the stockholder vote is non-binding. Specifically, as summarized above, the Proposal includes a Binding Vote Provision that states that “[s]hareholders request that the Board of Directors adopt a bylaw that no amendment to the bylaws, that is adopted by the [B]oard, shall take effect until it has been approved by a vote of the shareholders.” The following sentence of the Proposal constitutes the Non-Binding Vote Provision, which goes on to say that “[i]f 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 [B]ylaws that is adopted by the [B]oard.”

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Importantly, the Non-Binding Vote Provision is open to two different and conflicting interpretations as follows:

**Interpretation One:**

- A plain (and, we believe, the better) reading of the Non-Binding Vote Provision suggests that no Bylaw amendment adopted by the Board can be effective until a non-binding stockholder vote is held (regardless of the ultimate outcome) because the preceding Binding Vote Provision provides that no Bylaw amendment “shall take effect” until it has been approved by a vote of the stockholders, and the Non-Binding Vote Provision does not address effectiveness. In other words, the only difference between the Binding Vote Provision and the Non-Binding Vote Provision is the nature of the vote and its effect on a Bylaw amendment, but the vote must still be held, even under the Non-Binding Vote Provision, in order for such Bylaw amendment adopted by the Board to become effective.

**Interpretation Two:**

- A more Proponent-friendly reading of the Non-Binding Vote Provision (because it avoids a conflict with the Certificate of Incorporation) is that the Board has full authority to amend the Bylaws and to determine when any particular Bylaw amendment becomes effective. All that is required by the Non-Binding Vote Provision 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 Bylaw amendment (similar to the “say-on-pay” votes that U.S. public companies are required to hold seeking approval of their executive compensation).

Moreover, under Interpretation Two, there is uncertainty as to the effect of a *failure* to hold a non-binding stockholder vote on a Board-approved Bylaw amendment. The Proposal provides no guidance as to whether the failure to hold a vote would render such Bylaw 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 Bylaw 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 Bylaw amendment effective where the vote is non-binding. Moreover, the Supporting Statement provides no additional guidance as to how to resolve this ambiguity nor does it make any other references to the requested action other than precatory language stating that “[i]t is important that bylaw amendments take into consideration the impact that such amendments might have on limiting the rights of shareholders.” Because the Proposal reasonably can be read to have two

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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 Bylaw amendment that (i) prevents the Board from effecting any Board-approved Bylaw 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 Bylaw amendment adopted by the Board via a non-binding vote that otherwise has no legal effect on the validity or effectiveness of any such Bylaw amendment.

Accordingly, like in *Cisco Systems, Alaska Air Group*, and the other precedent cited above, the Proposal's inherent ambiguities subject the Non-Binding Vote Provision 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 that the Staff concur that it will take no action if the Company excludes the Proposal from its 2020 Proxy Materials.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (212) 351-2309 or contact Derek Windham, Vice President, Associate General Counsel Corporate, Securities and Finance at derek.windham@hpe.com.

Sincerely,



Lori Zyskowski  
Enclosures

cc: Derek Windham, Hewlett Packard Enterprise Company  
John Chevedden

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**EXHIBIT A**

\*\*\* JOHN CHEVEDDEN \*\*\*

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Mr. John F. Schultz  
Corporate Secretary  
Hewlett Packard Enterprise Company (HPE)  
6280 America Center Drive  
San Jose, California 95002  
PH: 650-857-2866  
FX: 650-857-4837

Dear Mr. Schultz,

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 implemented 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,

  
John Chevedden

October 8, 2019  
Date

cc: Derek Windham <derek.windham@hpe.com>  
Linda Epstein <linda.epstein@hpe.com>  
Linda Leung <linda.w.leung@hpe.com>

[HPE: Rule 14a-8 Proposal, October 8, 2019]  
[This line and any line above it – *Not* for publication.]  
**Proposal [4] – Shareholder Approval of Bylaw Amendments**

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.

It is important that bylaw amendments take into consideration the impact that such amendments will have on the rights of shareholders.

It is especially important to gain this right to make up for our management taking away an important shareholder right – the right to an in-person annual meeting. For decades shareholders had a once-a-year opportunity to ask our \$9 million CEO and directors (who earn about \$30,000 a week for the time they devote to HPE) questions in person.

This includes the directors who get by far the most negative votes:

Raymond Lane 16% negative

Lip-Bu Tan 11% negative

Patricia Russo 5% negative

Now our directors can be on the golf course during the annual meeting as long as they turn on their phones for a few minutes.

Investor relations can take control of the annual meeting. Investor relations can screen out the difficult questions and can spoon-feed vague answers to our CEO. There is no way a shareholder can ask for clarification of a vague or misleading answer on an important issue such as the \$7 billion share buyback program that was announced in 2018. In spite of such an enormous buyback program our stock has fallen from \$18 to \$13.

The lack of an in-person annual meeting means that a board meeting can be scheduled months after the virtual meeting – by which time any serious issues raised by shareholders will be long forgotten by our golf course directors. Plus a virtual meeting guarantees that there will be no media coverage for the benefit of all shareholders.

HPE shareholders gave 46%-support to a shareholder right to act by written consent for 2 consecutive years. The votes would have been a clear majority if our directors had been neutral on the written consent topic. Meanwhile it still takes 25% of shares to call for a special shareholder meeting. This 25% threshold can easily equate to a 50% threshold given the bureaucratic technicalities that can readily cause shareholders to make minor but critical mistakes in asking for a special shareholder meeting.

Please vote yes:

**Shareholder Approval of Bylaw Amendments – Proposal [4]**  
[The above line – *Is* for publication.]

John Chevedden,  
proposal.

\*\*\*

sponsors this

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

\*\*\*

\*\*\*

**JOHN CHEVEDDEN**

\*\*\*

Mr. John F. Schultz  
Corporate Secretary  
Hewlett Packard Enterprise Company (HPE)  
6280 America Center Drive  
San Jose, California 95002  
PH: 650-857-2866  
FX: 650-857-4837

REVISED 16 OCT 2019

Dear Mr. Schultz,

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 implemented 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,

  
John Chevedden

October 8, 2019  
Date

cc: Derek Windham <derek.windham@hpe.com>  
Linda Epstein <linda.epstein@hpe.com>  
Linda Leung <linda.w.leung@hpe.com>

[HPE: Rule 14a-8 Proposal, October 8, 2019, Revised October 16, 2019]

[This line and any line above it – *Not* for publication.]

**Proposal [4] – Shareholder Approval of Bylaw Amendments**

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.

It is especially important to gain this right to make up for our management taking away an important shareholder right – the right to an in-person annual meeting. For decades shareholders had a once-a-year opportunity to ask our \$9 million CEO and directors (who earn about \$30,000 a week for the time they devote to HPE) questions in person.

This includes the directors who get by far the most negative votes:

Raymond Lane 16% negative

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Now our directors can be on the golf course during the annual meeting as long as they turn on their phones for a few minutes.

Investor relations can take control of the annual meeting. Investor relations can screen out the difficult questions and can spoon-feed vague answers to our CEO. There is no way a shareholder can ask for clarification of a vague or misleading answer on an important issue such as the \$7 billion share buyback program that was announced in 2018. In spite of such an enormous buyback program our stock has fallen from \$18 to \$13.

The lack of an in-person annual meeting means that a board meeting can be scheduled months after the virtual meeting – by which time any serious issues raised by shareholders will be long forgotten by our golf course directors. Plus a virtual meeting guarantees that there will be no media coverage for the benefit of the vast majority of shareholders.

HPE shareholders gave 46%-support to a shareholder right to act by written consent for 2 consecutive years. The votes would have been a clear majority if our directors had been neutral on the written consent topic. Meanwhile it still takes 25% of shares to call for a special shareholder meeting. This 25% threshold can easily equate to a 50% threshold given the bureaucratic technicalities that can readily cause shareholders to make minor but critical mistakes in asking for a special shareholder meeting.

Please vote yes:

**Shareholder Approval of Bylaw Amendments – Proposal [4]**

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

John Chevedden,  
proposal.

\*\*\*

sponsors this

Notes:

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

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- 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

\*\*\*

October 20, 2019

**VIA OVERNIGHT MAIL AND EMAIL**

John Chevedden \*\*\*

Mr. Chevedden:

I am writing on behalf of Hewlett Packard Enterprise Company (the “Company”), which received on October 8, 2019, your stockholder proposal entitled “Shareholder Approval of Bylaw Amendments”, as revised and resubmitted to the Company on October 16, 2019, pursuant to Securities and Exchange Commission (“SEC”) Rule 14a-8 for inclusion in the proxy statement for the Company’s 2020 Annual Meeting of Stockholders (the “Proposal”).

The Proposal contains certain procedural deficiencies, which SEC regulations require us to bring to your attention. Rule 14a-8(b) under the Securities Exchange Act of 1934, as amended, provides that stockholder proponents must submit sufficient proof of their continuous ownership of at least \$2,000 in market value, or 1%, of a company’s shares entitled to vote on the proposal for at least one year as of the date the stockholder proposal was submitted. The Company’s stock records do not indicate that you are the record owner of sufficient shares to satisfy this requirement. In addition, to date we have not received proof that you have satisfied Rule 14a-8’s ownership requirements as of the date that the Proposal was submitted to the Company.

To remedy this defect, you must submit sufficient proof of your continuous ownership of the required number of Company shares for the one-year period preceding and including October 16, 2019, the date the Proposal was submitted to the Company. As explained in Rule 14a-8(b) and in SEC staff guidance, sufficient proof must be in the form of:

- (1) a written statement from the “record” holder of your shares (usually a broker or a bank) verifying that you continuously held the required number of Company shares for the one-year period preceding and including October 16, 2019; or
- (2) if you have filed a Schedule 13D, Schedule 13G, Form 3, Form 4 and/or Form 5 with the SEC, or amendments to those documents or updated forms, reflecting your ownership of the required number of Company shares as of or before the date on which the one-year eligibility period begins, (i) a copy of the schedule and/or form, and any subsequent amendments reporting a change in the ownership level, (ii) your written statement that you continuously held the required number of Company shares for the one-year period as of the date of the statement, and (iii) your written statement that you intend to continue ownership of the required number of Company shares through the date of the Company’s upcoming Annual Meeting of Stockholders.

If you intend to demonstrate ownership by submitting a written statement from the “record” holder of your shares as set forth in (1) above, please note that most large U.S. brokers

John Chevedden  
October 20, 2019  
Page 2

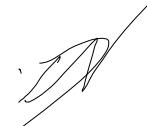
and banks deposit their customers' securities with, and hold those securities through, the Depository Trust Company ("DTC"), a registered clearing agency that acts as a securities depository (DTC is also known through the account name of Cede & Co.). Under SEC Staff Legal Bulletin No. 14F, only DTC participants are viewed as "record" holders of securities that are deposited at DTC. You can confirm whether your broker or bank is a DTC participant by asking your broker or bank or by checking DTC's participant list, which is available at <http://www.dtcc.com/~/media/Files/Downloads/client-center/DTC/alpha.ashx>. In these situations, stockholders need to obtain proof of ownership from the DTC participant through which the securities are held, as follows:

- (1) If your broker or bank is a DTC participant, then you need to submit a written statement from your broker or bank verifying that you continuously held the required number of Company shares for the one-year period preceding and including October 16, 2019.
- (2) If your broker or bank is not a DTC participant, then you need to submit proof of ownership from the DTC participant through which the shares are held verifying that you continuously held the required number of Company shares for the one-year period preceding and including October 16, 2019. You should be able to find out the identity of the DTC participant by asking your broker or bank. If your broker is an introducing broker, you may also be able to learn the identity and telephone number of the DTC participant through your account statements, because the clearing broker identified on your account statements will generally be a DTC participant. If the DTC participant that holds your shares is not able to confirm your individual holdings but is able to confirm the holdings of your broker or bank, then you need to satisfy the proof of ownership requirements by obtaining and submitting two proof of ownership statements verifying that, for the one-year period preceding and including October 16, 2019, the required number of Company shares were continuously held: (i) one from your broker or bank confirming your ownership, and (ii) the other from the DTC participant confirming the broker or bank's ownership.

The SEC's rules require that any response to this letter be postmarked or transmitted electronically no later than 14 calendar days from the date you receive this letter. Please address any response to me at 6280 America Center Drive, MS SJQ-L6-020, San Jose, CA 95002. Alternatively, you may transmit any response by email to me at [derek.windham@hpe.com](mailto:derek.windham@hpe.com).

If you have any questions with respect to the foregoing, please contact me at 650-236-8152. For your reference, I enclose a copy of Rule 14a-8 and Staff Legal Bulletin No. 14F.

John Chevedden  
October 20, 2019  
Page 3



Derek Windham  
Vice President, Associate General Counsel  
Corporate, Securities and Finance  
Hewlett Packard Enterprise Company

cc: John Chevedden

\*\*\*

Enclosures: (1) Rule 14a-8 and (2) Staff Legal Bulletin No. 14F

\*\*\*

From:  
Sent: Friday, November 1, 2019 7:17 AM  
To: Windham, Derek <[derek.windham@hpe.com](mailto:derek.windham@hpe.com)>  
  
Subject: Rule 14a-8 Proposal (HPE) blb

Mr. Windham,  
Please see the attached broker letter.  
Sincerely,  
John Chevedden



11/01/2019

John Chevedden  
\*\*\*

Re: Your TD Ameritrade Account Ending in \*\*\* in TD Ameritrade Clearing Inc DTC #0188

Dear John Chevedden,

Thank you for allowing me to assist you today. As you requested, this letter confirms that, as of the date of this letter, you have continuously held no less than the below number of shares in the above referenced account since July 1, 2018.

Netflix, Inc (NFLX) 20 shares  
Fortive Corp (FTV) 75 shares  
Dominion Resources Inc (D) 100 shares  
Ecolab Inc (ECL) 50 shares  
Hewlett Packard Enterprise Company (HPE) 150 shares

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 800 800 0000. We're available 24 hours a day, seven days a week.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew P. Haag".

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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GIBSON DUNN

**EXHIBIT B**



1313 North Market Street  
PO. Box 951  
Wilmington, DE 19899-0951  
302 984 6000  
[www.potteranderson.com](http://www.potteranderson.com)

November 22, 2019

Hewlett Packard Enterprise Company  
6280 America Center Drive  
San Jose, CA 95002

**Re: Stockholder Proposal Submitted by John Chevedden**

Ladies and Gentlemen:

You have requested our opinion as to certain matters of Delaware law in connection with your request that the staff of the Securities and Exchange Commission (the "Commission") grant no-action relief to Hewlett Packard Enterprise Company, a Delaware corporation ("HPE" or the "Company"), with respect to a stockholder proposal and a statement in support thereof (the "Proposal") submitted by John Chevedden. The Proposal, if adopted, would require the Board of Directors of HPE (the "Board") to amend the Amended and Restated Bylaws of HPE (the "Bylaws") to provide 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 stockholders of the Company or, alternatively, until a non-binding vote of the stockholders of the Company has been held. The Proposal is more fully set forth in the attached Exhibit A.

In connection with your request for our opinion, we have reviewed the following documents, all of which were supplied by the Company or were obtained from publicly available records: (i) the Amended and Restated Certificate of Incorporation of the Company, as filed with the Secretary of State of the State of Delaware (the "Secretary of State") on October 30, 2015, as amended by the Certificate of Designation of Series A Junior Participating Redeemable Preferred Stock of the Company, as filed with the Secretary of State on March 17, 2017, and the Certificate of Designation of Series B Junior Participating Redeemable Preferred Stock of the Company, as filed with the Secretary of State on March 17, 2017 (collectively, the "Certificate of Incorporation"); (ii) the Bylaws; and (iii) the Proposal.

With respect to the foregoing documents, we have assumed (i) the authenticity of all documents submitted to us as originals and the conformity with authentic originals of all documents submitted to us as copies or forms, and (ii) that the foregoing documents, in the forms submitted to us for our review, have not been and will not be altered or amended in any respect material to our opinions as expressed herein. For the purposes of rendering this opinion, we have conducted no independent factual investigation of our own, but have relied exclusively upon the documents listed above, the statements and information set forth therein and the additional matters related or assumed therein, all of which we have assumed to be true, complete and accurate in all material respects.

Based upon and subject to the foregoing, and upon such legal authorities as we have deemed relevant, and limited in all respects to matters of Delaware law, for the reasons set forth below, it is our opinion that the Proposal, if adopted and implemented, would violate Delaware

law, that the Company therefore lacks the power and authority to implement the Proposal and, accordingly, the Proposal is not a proper subject for stockholder action under Delaware law.

### The Proposal

The Proposal reads as follows:

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.

### Discussion

The Proposal is phrased as a request that the Board take action to amend the Bylaws to limit its authority to adopt, amend or repeal the Bylaws. Despite being phrased as a request, the Proposal is still an improper attempt by stockholders to exercise management authority that is expressly reserved to the Board by the General Corporation Law of the State of Delaware (the “DGCL”) and the Certificate of Incorporation.<sup>1</sup> Section 141(a) of the DGCL provides the board of directors of a Delaware corporation, and not the stockholders, with the express statutory authority to manage the business and affairs of the corporation. Section 141(a) of the DGCL provides:

The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.

*8 Del. C. § 141(a).* Consistent with this statutory delegation of authority, the Certificate of Incorporation provides that “[t]he management of the business and the conduct of the affairs of the Corporation shall be vested in its Board of Directors.” Certificate of Incorporation at Article VI, Section A. The Bylaws contain similar language.<sup>2</sup>

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<sup>1</sup> It is not clear why the Proposal requests that the Board take certain actions when the stockholders have concurrent authority to amend the Bylaws by an affirmative vote of a majority of the outstanding shares entitled to vote thereon. See Bylaws at Article IX. It is also unclear as to whether both Board and stockholder approval would be required to adopt the proposed amendment to the Bylaws or whether the Board may unilaterally adopt such amendment.

<sup>2</sup> The Bylaws provide that the Board’s authority to exercise corporate power is “subject to the provisions of the General Corporation Law of Delaware and to any limitations in the Certificate of Incorporation or

The principle that the directors, rather than the stockholders, manage the business and affairs of a Delaware corporation is a long-standing principle of Delaware law. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (“A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation.”); *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291 (Del. 1998) (“One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation.”). As a result, the stockholders of a Delaware corporation cannot require the directors to make decisions on matters with respect to which authority is specifically conferred on the directors by statute or the certificate of incorporation, such as adopting, amending or repealing certain provisions of the Bylaws.

The stockholders cannot substantially limit a board’s freedom to make decisions on matters of management policy. *See, e.g. Abercrombie v. Davies*, 123 A.2d 893 (Del. Ch. 1956), *rev’d on other grounds*, 130 A.2d 338 (Del. 1957) (holding that a stockholders’ agreement was invalid because it had the effect of restricting the ability of the directors to exercise their best judgment in making decisions on matters of management policy). Although stockholders may agree to a course of action, they may not commit directors to proceed with such course of action as it may force the directors to vote contrary to their own best judgment. *Id.* at 900; *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 231 (Del. 2008) (finding a stockholder-proposed bylaw invalid because it would “violate the prohibition, which our decisions have derived from Section 141(a), against contractual arrangements that commit the board of directors to a course of action that would preclude them from fully discharging their fiduciary duties”). To the extent the Proposal seeks to require the Board adopt the proposed amendment to the Bylaws, it violates Section 141(a) of the DGCL and, therefore, is not a proper subject for stockholder action.

In addition, the proposed Bylaw, if implemented, would violate Delaware law because the proposed Bylaw provision would limit the unfettered authority granted by the Certificate of Incorporation for the Board to adopt, amend or repeal the Bylaws.

Section 109 of the DGCL provides that “[t]he bylaws 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.” 8 Del. C. § 109(b) (emphasis added). Section (B) of Article VI of the Certificate of Incorporation states, “[i]n furtherance and not in limitation of the powers conferred by the laws of the State of Delaware, the Board of Directors is expressly authorized to make, alter, amend, or repeal the Bylaws of the Corporation.” The Certificate of Incorporation does not limit the Board’s power to adopt, amend or repeal the Bylaws in any

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[the] Bylaws relating to action required to be approved by the stockholders or by the outstanding shares . . .” See Bylaws at Article III, Section 3.1 We do not think that this provision can or should be interpreted to override the delegation of managerial authority to the Board in Section 141(a) of the DGCL and in the Certificate of Incorporation.

respect, and, therefore, the Certificate of Incorporation mandates that the Bylaws may be adopted, amended or repealed by the Board unilaterally.<sup>3</sup>

Any bylaw provision that contradicts the certificate of incorporation is invalid and a “nullity” under Delaware law.<sup>4</sup> *Gaskill v. Gladys Belle Oil Co.*, 146 A. 337, 340 (Del. Ch. 1929) (explaining that there is a gradation of authority with respect to the laws of a corporation, such that the “by-laws must succumb to the superior authority of the charter; the charter if it conflicts with the statute must give way; and the statute, if it conflicts with the constitution, is void”); *Centaur P’rs, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 929 (Del. 1990) (“Where a by-law provision is in conflict with a provision of the charter, the by-law provision is a ‘nullity.’”) (citing *Burr v. Burr Corp.*, 291 A.2d 409, 410 (Del. Ch. 1972); *Airgas, Inc. v. Air Prods. and Chems., Inc.*, 8 A.3d 1182, 1189 (Del. 2010) (“It is settled Delaware law that a bylaw that is inconsistent with the corporation’s charter is invalid.”); *Essential Enters. Corp. v. Automatic Steel Prods., Inc.*, 159 A.2d 288, 291 (Del. Ch. 1960) (finding that a bylaw amendment was invalid due to the fact that it was inconsistent with the certificate of incorporation because it would “frustrate the plan and purpose” of a charter provision implementing a classified board). Further, bylaw provisions may not unduly limit rights of a board of directors that are granted in the certificate of incorporation. “Courts have firmly adhered to this rule of law that a by-law may be held void if it tends ‘unreasonably’ to limit or qualify a right given in the certificate of incorporation, the General Corporation Law or one recognized by the common law.” See R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 1.10 (3rd Ed. 2019-2 Supp.).

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<sup>3</sup> The DGCL provides two express limitations – neither of which is relevant here - on a board’s power to adopt, amend or repeal bylaws. First, the DGCL prohibits directors from amending or repealing a stockholder adopted provision that opts out of Section 203 of the DGCL. 8 Del. C. § 203. Second, the DGCL prohibits directors from amending or repealing a stockholder adopted bylaw that specifies the voting requirements for the election of corporate directors. 8 Del. C. § 216.

<sup>4</sup> The consequence of approving an action that is not legally permitted due to a conflict with the DGCL or a corporation’s certificate of incorporation is that such action is void or voidable under Delaware law. In 2013, the Delaware legislature amended the DGCL to add Sections 204 and 205, which were intended to provide a safe harbor procedure for ratifying defective corporate acts that would otherwise be void or voidable due to a failure of authorization. See EDWARD P. WELCH, ROBERT S. SAUNDERS, ALLISON L. LAND & JENNIFER C. VOSS, FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 204.01 (6th Ed., 2019-3 Supp.) (citing the legislative synopsis of the 2013 amendments to the DGCL). Prior to Section 204’s enactment, the Delaware courts held that certain corporate acts that failed to comply with the DGCL or the corporation’s governing documents were void and could not be ratified. *Id.* (citing *Starr v. Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991) and *Blades v. Wisehart*, C.A. No. 5317-VCS, slip op. at 22 (Del. Ch. Nov. 17, 2010)). Section 204 provides that the term “defective corporate act” encompasses any corporate act or transaction purportedly taken that is within the power granted to a corporation by the DGCL but is void or voidable due to a “failure of authorization.” 8 Del. C. § 204(h)(1). A “failure of authorization” is defined to include “the failure to authorize or effect an act or transaction in compliance with (A) the provisions of [the DGCL], [or] (B) the certificate of incorporation or bylaws of the corporation . . . .” 8 Del. C. § 204(h)(2). As the proposed Bylaws would conflict with the Certificate of Incorporation, thereby, violating the mandate in Section 109(b) of the DGCL, we are of the view that if the proposed Bylaw were adopted, it would qualify as a defective corporate act under Section 204 of the DGCL.

The Delaware Supreme Court has held that a bylaw that contained a similar conflict with the certificate of incorporation to the Proposal was invalid. In *Centaur Partners, IV v. National Intergroup, Inc.*, stockholders of National Intergroup, Inc. (“National”) announced that they were soliciting consents to amend the bylaws to fix the number of directors at fifteen (15) and provided that such bylaw provision may not be amended by National’s board of directors. 582 A.2d 923, 925 (Del. 1990). However, several years earlier, National amended its certificate of incorporation to provide that the number of directors would be fixed as provided in the bylaws, but could not be less than three (3), and amended the bylaws of National to provide that “[t]he number of directors of the Corporation shall be fixed from time to time by resolution of a majority of the entire Board of Directors, provided that the number of directors of the Corporation shall not be fixed at less than three (3) . . . .” *Id.* at 925, 926 n.8. After finding that the proposed amendment to National’s bylaws would require a supermajority vote of the stockholders, the Court explained that, even if the amendment to National’s bylaw was properly adopted by the stockholders, it would be void because the proposed bylaw would obviously conflict with National’s certificate of incorporation.<sup>5</sup> *Id.* at 929. The proposed bylaw amendment would set the number of directors at fifteen, while National’s certificate of incorporation granted the board of directors broad authority to fix the number of directors, including by way of an amendment to the bylaws. Accordingly, the Court found that “[b]ecause the proposed [bylaw] provision is clearly ‘inconsistent with’ the directors’ power to enlarge the board *without limit*, it would be a nullity if adopted.” *Id.* (emphasis added).

More recently, in *Airgas, Inc. v. Air Prods. and Chems., Inc.*, the Supreme Court of Delaware considered whether a proposed bylaw that would schedule Airgas, Inc.’s (“Airgas”) next annual meeting for just four months after the prior year’s annual meeting was inconsistent with a provision in Airgas’s certificate of incorporation that created a staggered board of directors. 8 A.3d 1182, 1184 (Del. 2010). After determining that Airgas’s certificate of incorporation intended to create three-year terms for its directors, the Court determined that the proposed bylaw materially shortened the term of Airgas’s directors that was mandated by its certificate of incorporation. *Id.* at 1189. The Court further explained that the bylaw in question served to frustrate the plan and purpose behind the applicable charter provision and was “incompatible with the pertinent language of the statute and the [Charter].” *Id.* at 1194 (alteration in original) (citing *Essential Enters. Corp. v. Automatic Steel Prods., Inc.*, 159 A.2d 288 (Del. Ch. 1960)). Accordingly, the Court found that the proposed bylaw was invalid because it conflicted with the staggered board provision of Airgas’s certificate of incorporation.<sup>6</sup> *Id.* at 1194–95.

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<sup>5</sup> Although not noted in the opinion, National’s Restated Certificate of Incorporation included a provision similar to the provision in the Company’s Certificate of Incorporation regarding the ability of the board of directors to amend, alter or repeal its bylaws. Article SEVENTH of the Restated Certificate of Incorporation of National, which was publicly filed with the Secretary of State of the State of Delaware on March 18, 1983, provides the following: “In furtherance and not in limitation of the power conferred by the statute, the Board of Directors is expressly authorized to make, alter or repeal the by-laws of the Corporation.”

<sup>6</sup> The Supreme Court explained that the bylaw would also be invalid because it amounted to a *de facto* removal of the directors without cause, which would also contravene the provisions of the certificate of incorporation.

The Proposal essentially eliminates the Board's authority to adopt, amend or repeal the Bylaws unilaterally by conditioning the effectiveness of a Board-adopted bylaw on either a binding or non-binding vote of the HPE stockholders. The Certificate of Incorporation, in compliance with Section 109 of the DGCL, clearly grants the Board the power to unilaterally adopt, amend and repeal the Bylaws and does not impose any limitation on the Board's power to adopt, amend or repeal the Bylaws. Because the Proposal presents a clear conflict between the proposed Bylaw provision and the Certificate of Incorporation, it is impermissible under Delaware law.

The Proposal provides that “[i]f 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.” This provision does not, however, save the Proposal as it merely exchanges one precondition for another. Requiring a non-binding stockholder vote prior to the effectiveness of the Bylaw is still a limitation or qualification on the Board's unfettered ability to adopt, amend or repeal the Bylaws, which, as discussed above, conflicts with the Certificate of Incorporation and, therefore, is impermissible under Delaware law.

Further, even if the Board were to adopt, and agree to abide by, the proposed Bylaw provision, requiring either a binding or non-binding vote of the stockholders, the proposed Bylaws would impermissibly infringe on the Board's ability to comply with its fiduciary duties. For example, the Board could, in its business judgment, determine that their fiduciary duties require the directors to adopt an amendment to the Bylaws immediately in response to an actual or perceived threat and that, if the effectiveness of such amendment is delayed, there is a substantial likelihood that the Company will be harmed. In that scenario, if the Board abided by the proposed Bylaw, the Bylaw would not be effective until the Company convened a meeting of the stockholders, which could take weeks if not months to schedule and provide requisite notice.<sup>7</sup> If the Board determined that there was a substantial likelihood of harm to the Company in delaying the effectiveness of such amendment, the Board would be in breach of its fiduciary duties by not adopting such amendment effective immediately when the Certificate of Incorporation clearly provides the Board the right to do so. In other words, by agreeing to seek a stockholder vote (whether binding or non-binding) on all amendments to the Bylaws adopted by the Board where the Board has the unlimited authority to amend the Bylaws pursuant to the Certificate of Incorporation, the Board is putting future directors in a position that could require them to breach their fiduciary duties in order to comply with such Bylaw, which is impermissible under Delaware law. *See, e.g., CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 231 (Del. 2008) (explaining that a proposed Bylaw was invalid because complying with the Bylaw would, in at least one hypothetical circumstance, require the directors to breach their fiduciary duties).

Based on the foregoing, it is our opinion that the Proposal, if implemented, would violate Delaware law and, therefore, is not a proper subject for stockholder action.

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<sup>7</sup> Section E of Article VI of the Certificate of Incorporation provides that “[n]o action shall be taken by the stockholders of the Corporation except at an annual or special meeting of the stockholders called in accordance with the Bylaws of the Corporation and no action shall be taken by the stockholders by written consent.”

Hewlett Packard Enterprise Company

November 22, 2019

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This opinion is rendered solely for your benefit in connection with the foregoing and may not be relied upon by any other person or entity or be furnished or quoted to any person or entity for any purpose, without our prior written consent; provided that this opinion may be furnished to or filed with the Commission in connection with your no-action request relating to the Proposal.

Very truly yours,

*Potter Anderson & Corroon LLP*

POTTER ANDERSON & CORROON LLP

**Exhibit A**  
**Proposal**

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JOHN CHEVEDDEN

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Mr. John F. Schultz  
Corporate Secretary  
Hewlett Packard Enterprise Company (HPE)  
6280 America Center Drive  
San Jose, California 95002  
PH: 650-857-2866  
FX: 650-857-4837

REVISED 16 OCT 2019

Dear Mr. Schultz,

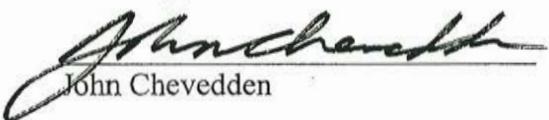
This Rule 14a-8 proposal is respectfully submitted in support of the long-term performance of our company.

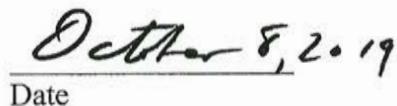
This Rule 14a-8 proposal is intended as a low-cost method to improve company performance – especially compared to the substantial capitalization of our company.

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 implemented 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,

  
John Chevedden

  
Date

cc: Derek Windham <derek.windham@hpe.com>  
Linda Epstein <linda.epstein@hpe.com>  
Linda Leung <linda.w.leung@hpe.com>

[HPE: Rule 14a-8 Proposal, October 8, 2019, Revised October 16, 2019]

[This line and any line above it – *Not* for publication.]

**Proposal [4] – Shareholder Approval of Bylaw Amendments**

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.

It is especially important to gain this right to make up for our management taking away an important shareholder right – the right to an in-person annual meeting. For decades shareholders had a once-a-year opportunity to ask our \$9 million CEO and directors (who earn about \$30,000 a week for the time they devote to HPE) questions in person.

This includes the directors who get by far the most negative votes:

Raymond Lane 16% negative

Lip-Bu Tan 11% negative

Patricia Russo 5% negative

Now our directors can be on the golf course during the annual meeting as long as they turn on their phones for a few minutes.

Investor relations can take control of the annual meeting. Investor relations can screen out the difficult questions and can spoon-feed vague answers to our CEO. There is no way a shareholder can ask for clarification of a vague or misleading answer on an important issue such as the \$7 billion share buyback program that was announced in 2018. In spite of such an enormous buyback program our stock has fallen from \$18 to \$13.

The lack of an in-person annual meeting means that a board meeting can be scheduled months after the virtual meeting – by which time any serious issues raised by shareholders will be long forgotten by our golf course directors. Plus a virtual meeting guarantees that there will be no media coverage for the benefit of the vast majority of shareholders.

HPE shareholders gave 46%-support to a shareholder right to act by written consent for 2 consecutive years. The votes would have been a clear majority if our directors had been neutral on the written consent topic. Meanwhile it still takes 25% of shares to call for a special shareholder meeting. This 25% threshold can easily equate to a 50% threshold given the bureaucratic technicalities that can readily cause shareholders to make minor but critical mistakes in asking for a special shareholder meeting.

Please vote yes:

**Shareholder Approval of Bylaw Amendments – Proposal [4]**

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

John Chevedden,  
proposal.

\*\*\*

sponsors this

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

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